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WISCONSIN REPORTS

114

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

APRIL 1 — JUNE 19, 1902.

FREDERIC K. CONOVER
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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

MEMORANDUM.

The cases reported in the first 116 pages of this volume were, for the most part, prepared for publication by Charles F. Lamb, Esquire, of Madison.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 113.

Page 247, line —9. For ch. 187, read ch. 287.
" 512, line 3. For 111 Wis. 40, read 112 Wis. 40.
" 738. For 1874. Ch. 114, read 1874. Ch. 184.
For 1897. Ch. 187, read 1897. Ch. 287.
Omit: 1892. Ch, 399, sec. 19 . . . 213.
" 739. For 1889. Ch. 355, read 1899. Ch. 355.

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CASES DETERMINED

AT THE

January Term, 1902.

ALLEN, Respondent, vs. VOJE, Appellant.

March 11—April 1, 1902.

Physicians and surgeons: Malpractice: Negligence: "Order": "Judgment": Change of venue: Waiver: Witnesses: Medical experts: Qualifications: Hypothetical questions: Examination of witnesses: Objections: Practice: Court and jury: Prejudicial error: Husband and wife: Agency: Abuse of discretion: Proximate cause: Instructions to jury: Excessive damages.

1. An order or judgment is the decision of the court, formulated in writing by the judge, or declared by him orally; in the latter event the duty rests upon the clerk to write out the substance upon his records, in which case it becomes entered as completely as if written out by the judge himself and signed by him.
2. Where an order or judgment is reduced to writing, the writing is, at most, but the evidence of the decision in fact made.
3. Where the place of trial of the action was changed, and the records of the circuit court disclosed that in open court the affidavit and motion for such change were presented and "the change of venue ordered to the county court," it was *held* that there had been a complete compliance with sec. 2625, Stats. 1898, commanding that upon the affidavit and motion "the court shall change the place of trial," and "an order for a change of the place of trial shall be entered."
4. Under sec. 2628, Stats. 1898, providing that "after the place of trial . . . shall have been changed and a trial had in the county to which the change was made, the proceedings or order for such change shall be conclusive, except as against such ob-

jection as shall have been filed in writing upon a motion to remand before such trial was entered upon," an objection to the change cannot be made for the first time in the supreme court on appeal. The statute is intended to cure all defects, and to impose a conclusive presumption of waiver of all objection, and of consent to the change, unless objection be made in writing before entering upon the trial.

5. Witnesses, qualifying as medical experts, testified that they had licenses from the state medical board, and one of them further testified that he was a graduate, holding a diploma from a regularly incorporated medical college, at a time when that alone would suffice to qualify him to testify. *Held*, that the witnesses were qualified, although their licenses were not recorded in the counties where they were practicing, as required by sec. 4, ch. 87, Laws of 1899; exclusion from testifying as experts is not prescribed as a penalty for failure to record their licenses, either by said ch. 87, or by sec. 1436, Stats. 1898, limiting the right or privilege to those holding such license or diploma.

6. The testimony of a witness, qualifying as a medical expert, that he was "a physician and surgeon duly licensed to practice in this state," in the absence of any evidence controverting it, or any cross-examination, is *held* to mean that he had received such a license.

7. Where, on objection being made to a hypothetical question, the examining attorney invites suggestions as to any inaccuracy of statement, or any fact omitted, and offers to make correction, which invitation is declined, such conduct ordinarily precludes counsel from thereafter predicating error upon inaccuracies of the question.

8. In the make-up of a bill of exceptions, it appeared that a medical expert, who had been examined upon a hypothetical state of facts and expressed his opinion, closed his answer to an objected question by saying, "It should have been done." Some lines further on, after speaking of other subjects, he was made to say, in testimony written out in narrative form, "I think, beyond a doubt, the evidence points to" the condition at issue. *Held*, that such conclusion could not have been given in response to the objected question, but in response to another question not preserved in the record, and to which no objection appeared to have been made.

9. In such case, the question would not be erroneous unless the answer was responsive to the question, and if non-responsive, counsel, in order to save an objection, should move to strike it out.

10. In an action for malpractice, physicians, residing in a near-by city, were permitted, against objection, to answer a question whether, in their opinion, certain treatment was proper, and "sanctioned" by physicians and surgeons possessing and exercising ordinary skill and intelligence in the vicinity of the place where the treatment was given. *Held*, that such inquiry was proper as calling for a conclusion whether the specified treatment was in accord with the methods adopted by such physicians generally, and was not open to an objection that it called upon third persons to testify as to the opinions of others.

11. In such case it appeared that the witnesses lived thirty miles from the place where the treatment was given, and qualified themselves to speak on the subject by testifying that they were familiar with the practice of medicine and customs of the profession in the latter place. *Held*, that no error was committed in permitting such inquiries to be made.

12. In such case it is not prejudicial error to permit a physician to answer a question: "What conditions were necessary to a *thoroughly and completely aseptic* surgical operation?" where the witness's description of the required conditions did not go as far as the precautions which the testimony showed were taken, and which, it was substantially conceded, were necessary.

13. In such action it appeared that plaintiff had requested her husband to go to defendant, a physician, and make certain inquiries as to the significance of her symptoms, and necessary treatment therefor. In testifying to his conversation with the defendant, he was asked: "Did he (the defendant) state what the operation would be? What operation was it he meant, if you know?" *Held*, that such questions clearly called for a part of a transaction within the field of the agency of the witness.

14. It is not an abuse of discretion for the trial court to refuse to allow a trained nurse, attempting to testify as a medical expert, to answer questions calling for an opinion on a strictly medical subject, especially where it is apparent to the court that the party calling for such opinion is supplied with numerous experts, thoroughly qualified, who were permitted to testify on the subject.

[15. Whether the purpose of sec. 1436, Stats. 1898 (prohibiting physicians from testifying as experts unless their qualifications be established by diploma or license as therein defined), is to confine all expert testimony upon medical subjects to persons having the statutory qualifications, or whether it is merely a

restriction upon practicing physicians and surgeons, intended to induce them to comply with the statutory requirements with reference to license, not determined.]

16. If there is credible evidence, however it may be contradicted, a question of fact arises to be passed upon by the jury.
17. In an action for malpractice, where the injury consisted in localization of pus following an operation by curettement, and necessitating the subsequent removal of plaintiff's ovary, neither a finding as to proximate cause, nor instructions thereon, are necessary. The defendant's duty to reasonably anticipate injury from the negligent conduct of such an operation, and the probability of injury, are apparent, as a matter of law.
18. In an action for malpractice, an excerpt from an instruction—that "a departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been"—is not erroneous, where the court has, by the rest of the charge, excluded the idea of liability for variations from customary practice merely in the way of increased precautions, recognized as such.
19. In such action an instruction, that if defendant did not follow such established practice as is "recognized, adopted, and followed by all physicians and surgeons in good standing," etc., it would be negligence, cannot be construed to require defendant to have and exercise the skill of *all* physicians residing in his neighborhood, but declares that he is liable only in case he omits a practice which was recognized and adopted by all.
20. In an action for malpractice, where the injury resulted in much suffering, and necessitated a difficult operation—the removal of one of plaintiff's ovaries—resulting in impairment of health and genital functions, a verdict for $3,000 is not excessive.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

The plaintiff, then about thirty-five years of age, having been long a sufferer from uterine trouble, which, however, did not incapacitate her from doing the ordinary work of a farmer's wife, went for treatment to the defendant, who maintained at Oconomowoc a sanitarium for the treatment of chronic diseases of various sorts. Remaining in his sanitarium for about four weeks for general treatment, she returned to her home for a similar period, under the care of her family

physician, and shortly before July 30, 1899, returned to defendant's sanitarium. He made examination, and found suppurating, inflammatory condition of the interior of the uterus, and considerable other inflammation throughout the pelvic region. Plaintiff complains that on this occasion she was placed in a basement room, dark, damp, and uncomfortable, containing charts and casts displaying various parts of the human body, which distressed her greatly, and against which she protested. After a day or two of preparation, there was performed on her the operation of curettement, consisting of the scraping of the internal membrane of the uterus. She offers testimony that this operation was performed under highly improper circumstances, in the same room inhabited by herself and another patient, which was dirty, contained the clothes of the inmates, and had various characteristics making infection probable. After the operation, plaintiff offers evidence that she suffered great inflammation and pain, accompanied by sickness at the stomach, and that she was left without any proper attendance or care, being obliged, notwithstanding her weakness and the great pain occasioned thereby, to care for herself when sick at the stomach; that the matter thrown up was allowed to remain hours, and that the fecal matter from her bowels was allowed to remain uncovered for a long time in the room; that all of these things caused her great distress, mental and physical, besides retarding her recovery. She further claims and offered evidence to show: That, immediately following the operation of curettement, there developed general inflammation and bloat throughout the pelvic region. That extreme pain developed in the region of the right ovary, which previously had been free from pain or indication of trouble,—and relates symptoms which certain of the physicians testified indicated the development of a localization of pus in the right ovary. As the bloated condition diminished, a lump, characterized by severe pain, became perceptible in the right ovarian region, and persisted, in-

creasing somewhat in size. That defendant's attention was repeatedly called to it, but that he gave it no attention or treatment. That she remained under his hands some ten weeks, becoming more and more run down, and then returned to her home, where, after almost reaching death's door, and the lump before referred to having attained proportions of five or six inches in diameter, it was diagnosed as a tubo-ovarian abscess, and had to be operated upon, resulting in the removal of the right ovary and Fallopian tube, which were found to be filled with pus.

The principal claims are: First. That the condition of the room and lack of attention caused plaintiff great temporary discomfort and damage. Secondly. That the plaintiff's condition was such that the operation of curettement was improper; that an ordinarily careful physician would not have subjected her to it, but would have anticipated those injuries which did result, namely, infection of other parts of the body, especially of the ovaries; and that the result of such improper operation was the infection of other parts of plaintiff's body, the formation and localization of pus in the right ovary, the consequent long-continued pain, suffering, and difficult operation, and ultimate loss of the ovary, with the impairment of plaintiff's health and of her genital function. Thirdly. That the operation of curettement was accompanied by neglect of ordinary precautions to render it aseptic and to guard against infection from the outside, whereby naturally resulted the subsequent conditions. Fourthly. That it was neglect, after the symptoms with reference to the bunch in the right ovarian region were brought to the defendant's attention, not to diagnose the same as a gathering of pus and to remove it; thus saving the plaintiff months of suffering and the greatly exaggerated operation later.

Substantially all of these contentions of negligence were controverted by evidence offered by the defendant. The court overruled motions by the defendant for nonsuit and for the

direction of a verdict, and submitted the case to the jury upon three questions, which, with their answers, were as follows:

"1. Was the defendant in this action, in the course of his treatment of the plaintiff from May 29 to October 10, 1899, guilty of negligence? *A.* Yes. 2. If you answer the first question, 'Yes,' did the plaintiff sustain injury in consequence of such negligence? *A.* Yes. 3. If you answer both of the preceding questions, 'Yes,' at what sum do you assess the plaintiff's damages for such injury? *A.* Three thousand dollars."

Defendant moved to set aside the verdict and for new trial because the damages were excessive, because the evidence did not support the several answers, because of admission of improper evidence, and because of errors in the charge, which motion was overruled, and judgment entered for the plaintiff for the amount found by the jury, from which defendant appeals.

George E. Robinson, attorney, and *T. E. Ryan,* of counsel, for the appellant.

Paul D. Durant and *John F. Burke,* for the respondent.

Dodge, J. Numerous specific assignments of error are alleged and argued. They will be considered in the order of their presentation.

1. The contention of appellant that error was committed in refusing to remand the present case to the circuit court after the trial had been completed and the verdict rendered is wholly untenable. It is predicated alone upon the fact that no written order directing the change from circuit to county court was signed by the judge. The records of the circuit court disclose that in open court the affidavit and motion for such change were presented, and "change of venue ordered to the county court August 28th." This was a complete compliance with sec. 2625, Stats. 1898, which commands that upon the affidavit and motion "the court shall change the place of trial," and after waiting, in his discretion, to secure

another judge, on the last day of the term "an order for a change of the place of trial shall be entered." An order or judgment is the decision of the court. It may be formulated in writing by the judge, or declared by him orally. In the latter event the duty rests upon the clerk to write the substance upon his records. That was done in this case, and thereupon the order became entered as completely as if written out by the judge himself and signed by him. *Baker v. Baker,* 51 Wis. 538, 8 N. W. 289; *Harris v. Snyder,* 113 Wis. 451, 89 N. W. 660. The writing is, at most, the evidence of the decision in fact rendered. *Findlay v. Knickerbocker I. Co.* 104 Wis. 375, 378, 80 N. W. 136. Another answer to appellant's contention consists in the fact that he did not make his objection in time. Sec. 2628, Stats. 1898, provides:

"After the place of trial . . . shall have been changed and a trial had in the county to which the change was made, the proceedings or order for such change shall be conclusive except as against such objections as shall have been filed in writing upon a motion to remand before such trial was entered upon."

This statute is obviously intended to cure all defects, and to impose upon a party conclusive presumption of waiver of all objection, and consent to the change, unless he objects in writing before entering upon the trial.

2. We hardly understand the objection to the competency of Drs. Goette and Peck as medical experts. They both testified that they held licenses from the state medical board; and, further, Dr. Goette testified that he was a graduate holding a diploma from a regularly incorporated medical college at a time when that alone would suffice to qualify him to testify. True, the language of Dr. Peck's testimony as to his qualification was, "I am a physician and surgeon duly licensed to practice in this state." It perhaps contains an element of conclusion, but in the absence of anything controverting it,

or any cross-examination, it must be understood to mean that he has received a license. It is suggested that sec. 4, ch. 87, Laws of 1899, requires physicians holding licenses to procure them to be recorded in the counties where they are to practice; but the only penalty for a failure so to do is prescribed by the same act, and is not an exclusion from the privilege of testifying as experts. That right or privilege is limited only by sec. 1436, Stats. 1898, which contains no such requirement. *Schaeffer v. State,* 113 Wis. 595, 89 N. W. 481.

3. Complaint is made of a very extended hypothetical question which was propounded to substantially all of the plaintiff's medical experts. The objections to it now urged are that it contained the statement that on the 5th, 6th, and 7th days after curettement, plaintiff's temperature rose to 102.6, and that during the same period she suffered severe pains in the region of her right ovary. It is insisted that this was not in accordance with the evidence, and therefore was misleading to the jury, and rendered the question improper. We find the head nurse, Mrs. Green, testified that at this time "her temperature was 102, and I think 102.6"; and the defendant himself, in his direct examination, speaks of that as the maximum attained during this period. We also find that the plaintiff repeatedly testified that during this period she suffered extreme pain in the region of her ovaries and on the right side. So both of these elements of the objected question had support in the evidence. Whether there are other inaccuracies, either of commission or omission, in this extended hypothetical question, it is not the duty of the court to investigate and ascertain. Those that the appellant points out do not exist. The appellant hardly stands in any position to complain of this question, in any event. When he made the objection thereto upon the trial, the plaintiff's attorney invited him to suggest any inaccurate statement contained therein, or any proper fact omitted, offering to make due correction. This the defendant's attorney refused to do. Such

conduct should ordinarily preclude counsel from thereafter predicating error upon a hypothetical question on the grounds now urged. *Cornell v. State,* 104 Wis. 527, 535, 80 N. W. 745; *Davey v. Janesville,* 111 Wis. 628, 633, 87 N. W. 813.

A further objection is somewhat indefinitely made, that certain experts were called on to pass upon the credibility of evidence. We have carefully examined the testimony complained of, and find no support for the objection. In every case, either the question is free from that objection, or the counsel is urging our attention to testimony related in narrative, which obviously was never given in response to the printed and objected question. Thus, of Dr. Madden it was asked if it was proper practice to allow the patient to leave the sanitarium or hospital, and go to her home, without informing her or her relatives of the true condition of the localized pus or abscess. This was after he had been examined upon a hypothetical state of facts, and had expressed the opinion that there was such localized pus. Obviously, the question is open to no other construction than that of referring to the situation as to which he had already testified. He completed his answer to that question by saying, "It should have been done." Some lines further on, after speaking of other subjects, he is made to say, in narrative, "I think, beyond a doubt, the evidence points to an abscess." It is absurd for appellant to urge to judges who have themselves participated in trials, and in the make-up of bills of exceptions, that this statement was given in response to the objected question. If it was, it was not responsive, and would not make the question erroneous; and counsel, if he would save an objection thereto, must have moved to strike it out, which he did not do. The objected question to Dr. Brown, as to how long it would require for the abscess to attain a certain size, is expressly predicated upon a hypothetical statement of facts, and the physician's answer is, "From five to eight or ten weeks, perhaps." This completes the whole answer responsive to that

question, and in narrative form the witness then states that he thinks the foregoing facts show the existence of pus in the patient's right ovarian region. Of course, this was in response to another question, to which no objection appears to have been made. Other questions to Dr. Brown, and his answers, which were argued at some length, present the same situation. The objected question is unobjectionable, and testimony which is selected for criticism was in no wise responsive to such question, was obviously given in response to other questions, and, in any event, not being responsive, could not make the question bad, even if it is obnoxious to a motion to strike out, which counsel did not make.

Further assignments of error are predicated upon the permitting of Milwaukee physicians to testify in response to a question whether, in their opinion, certain treatment was proper and "sanctioned" by physicians and surgeons possessing and exercising ordinary skill and intelligence in the vicinity of Oconomowoc. It is claimed, first, that this is calling upon third persons to testify as to the opinion of others. We do not so regard it. It was no more than a method of expressing the inquiry whether the specified treatment was in accord with the methods adopted by such physicians generally. Nor do we discover any force to the second objection,—that Milwaukee physicians should not have been allowed to testify with reference to proper practice in the vicinity of Oconomowoc. The two places are but about thirty miles apart, and the physicians qualified themselves to speak on the subject by testifying that they were familiar with the practice of medicine and customs of the profession in the vicinity of Oconomowoc. We think no error existed in permitting these inquiries to be made. Further complaint is made of the inquiry to Dr. Brown, "What conditions were necessary to a thoroughly and completely aseptic surgical operation?" While, of course, the appellant's counsel is correct in the proposition that defendant was not required to have condi-

tions insuring a "thoroughly and completely aseptic" surgical operation, unless such conditions were customarily secured by ordinarily careful physicians and surgeons, yet an explanation to the jury of what those characteristics were, we think, was harmless in this case, because Dr. Brown, in his description of them, went no further than (indeed, not so far as) the precautions which the defendant and his witnesses testified that they took, and substantially conceded were necessary to a proper operation,—indeed, such as the chief nurse testified were commonly taken.

4. Error is assigned because the plaintiff's husband was permitted to testify to matter which the appellant contends was not within any agency. It having appeared that his wife had requested him to go to the defendant and make certain inquiries as to the significance of her symptoms, and necessary treatment therefor, he proceeded to testify as to his conversation with the defendant. The only objected question was: "Did he [the defendant] state what the operation would be? What operation was it he meant, if you know?" This clearly called for a part of the transaction between the witness and the defendant, wherein the former was acting at the request and on behalf of the plaintiff, to ascertain facts needed by her for her guidance and treatment. This is clearly within the field of agency. He was acting in her behalf. Here, again, appellant's counsel indulges in criticism upon two or three pages of testimony having no relevancy to that question, and which was, of course, given in response to many others. If that testimony was improper, counsel should have made his objection in the trial court, and not waited till he reached this.

5. The seventh assignment of error arises thus: A witness having testified that she was a trained nurse and had had many years' experience, and having testified with reference to the plaintiff's symptoms, including the temperature of 102, and that she did not at any time notice any dangerous symp-

toms, but that 104 degrees of temperature would be an alarming temperature, the question was put, "Is 102 alarming?" an objection to which was overruled, and she permitted to testify that "102 is indicative of some trouble; 104, that the patient was in a critical condition." Whereupon she was asked, "Does the record or chart kept of the condition of *Mrs. Allen* show any dangerous condition of the patient, so far as the temperature is concerned?" Also, "Is 102.4, or is it not, a symptom of alarming danger?" Objections to both these questions were sustained. The questions clearly called for an opinion upon a strictly medical subject, and if it be conceded that proof of considerable experience as a trained nurse might qualify one as an expert to give opinion thereon, as to which authorities are in some conflict (*Mason v. Fuller,* 45 Vt. 29, and *Dashiell v. Griffith,* 84 Md. 363, 35 Atl. 1094), an interesting question is suggested, as to the force of the statute (sec. 1436, Stats. 1898) in terms prohibiting practicing physicians from testifying as experts unless their qualifications be established by diploma or license as therein defined. Whether the purpose of this statute is to confine all expert testimony upon medical subjects to persons having the statutory qualifications, or whether it is merely a restriction upon practicing physicians and surgeons, intended to induce them to comply with the statutory requirement with reference to license, is a subject upon which there might be debate. The latter view derives some support from *People v. Rice,* 159 N. Y. 400, 54 N. E. 48. The question, however, is not discussed by counsel on either side; and, as it is of much importance, we do not feel justified in undertaking an investigation and decision of it without argument, unless essential to the decision of the cause, which we think is not the case. The utility and safety of expert evidence, as well as the sufficient qualification of the expert, are subjects over which trial courts have very broad discretion. *People v. Rice, supra; Dashiell v. Griffith,* 84 Md. 378, 35 Atl. 1094; and *Cornell v. State,*

104 Wis. 537, 80 N. W. 745. This particular witness had been permitted to answer questions almost identical with those which were excluded, and, in addition, the fact was apparent to the court that defendant was supplied with numerous thoroughly qualified expert witnesses, including himself,—physicians especially fit to speak upon a subject of medical knowledge, experience, and opinion, and much more likely to be safe guides to the court and jury than would any witness not having those qualifications, and whom he did permit to testify on this subject. In that situation, we do not doubt that it was within the wise discretion to be exercised by trial courts to refuse to permit this witness to testify further on the subject, and that no error was committed.

6. The eighth assignment of error brings up the denial of motion for nonsuit, motion to direct a verdict for the defendant, and motion to set aside the verdict and grant a new trial. Of course, the rule that if there is any credible evidence, however it may be contradicted by that of the defense, a question of fact arises to be passed on by the jury, is too trite to need more than statement. The principal claims of malpractice are set forth in the statement of facts, and we have no doubt, from a careful inspection of the record, that there is evidence to support each of those three claims, whatever might be our view as to the preponderance of evidence for or against either of them. With reference to the first, the plaintiff and her roommate, Mrs. Riebe, testify with entire positiveness to the unfitness of the room for care and treatment of a woman in plaintiff's condition, and of her neglect by nurses, whereby, while suffering excruciating pains, greatly enhanced by any movement, and while suffering from extreme nausea, she was left without attendance, and required to raise herself and to vomit over the side of the bed, without any receptacle, and that the matter thus ejected was left for hours before being cleaned up; that fecal matter was left standing in open vessels in close proximity to her bed for long periods of time;

and that the conditions of the room at the time of the curettement were such that all the physicians, including the defendant himself, declared their unfitness for such an operation, and the extreme peril of infection in the process thereof. True, the defendant and certain of his nurses contradict more or less completely all of these statements, and it might reasonably be argued to a jury that, as to some of those relating to the nonaseptic conditions, neither the plaintiff nor Mrs. Riebe were in position to know positively; but as to other of those conditions the testimony is in irreconcilable conflict, and certainly justified the submission to the jury of the question both as to the condition of the room and neglect of plaintiff by nurses, to her physical and mental suffering while there confined, and also with reference to the neglect of precautions against infection during the operation upon her.

On the second question—as to whether defendant departed from recognized and established methods of treatment in performing the operation of curettement at all, in view of the diseased condition of surrounding organs and tissues, which, by the way, is the most important of his alleged malpractices, in possible results—there is the testimony of two or three of the physicians, notably Dr. Henrotin, called by the defendant, first, that such operation is frequently proper "when there are no symptoms of pelvic inflammation outside of the uterus," carrying clearly the implication of impropriety when such symptoms do exist. He also testifies:

"Curettement is frequently the means of doing harm, as well as great benefit. The harm is that septic infections surrounding previously healthy tissue is frequently made possible by the curettement opening up new avenues of infection, . . . most likely to manifest itself in the Fallopian tubes, —particularly in the ovaries."

Dr. Brown testifies:

"The operation of curettement is not proper for the cleaning and scraping of the womb if there was inflammation of

the tissues. If that infection is located otherwise, there is all the more reason for not operating. If the history of the patient shows that there had been infection for seven or eight years, or symptoms of it, I would have left it alone; I would have operated for the removal of the infection. I would judge from the hypothesis given that infection had taken place in the left side, in the region of the ovary, prior to entrance to the hospital. Under those conditions I would have operated for the removal of the infection before I curetted."

Other physicians suggested the same view. We cannot avoid the conviction that the question was an open one for the jury whether it was not failure to exercise proper skill and the judgment ordinarily exercised, in deciding to make the operation of curettement at all at the time, and under the physical conditions existing when it was made, as well as under the surrounding nonaseptic conditions to which plaintiff and Mrs. Riebe testify.

The third element of complaint was failure to diagnose the existence of localized pus in the right ovary at an early date after the curettement, and to remove the same, instead of allowing the gathering to continue for some ten weeks, and allowing the patient to return to her home without instruction as to the existence of such pus and the necessity for its removal. The evidence is quite abundant, not to say preponderant, that, from the symptoms disclosed, an ordinarily skilful and careful physician would have diagnosed a localized gathering of pus within a couple of weeks after the curettement; and, with few exceptions, the medical witnesses testify that due care required an operation to remove it by incision and drainage as soon as its existence was discovered. True, there is testimony that palliative treatment might be permissible practice, but this has no more effect than to raise the question of fact for decision by the jury. We therefore conclude that the court would not have been justified in ordering either nonsuit or verdict for the defendant, and that the exer-

cise of his discretion against the granting of a new trial was not an abuse thereof.

7. The ninth and eleventh assignments of error complain that the element of proximate causation connecting defendant's alleged negligence and plaintiff's injuries was not found by the jury, either expressly by answer to direct question, or impliedly by reason of any instruction making it a prerequisite to affirmative answer to either the first or second question. The fact is as claimed. Instructions went no further than the questions themselves; that is, simply to submit the fact of negligence in the respects stated, and the fact of actual causation of injury. The importance, ordinarily, in negligence cases, of a finding by the jury upon the question of proximate causation as a fact, under proper instruction from the court as to the law, has been so recently discussed and enforced that there is no occasion to enlarge upon the subject again. *Sheridan v. Bigelow,* 93 Wis. 426, 67 N. W. 732; *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124; *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178. The rule is without exception that liability in damages for acts or conduct lacking in ordinary care cannot arise unless the act be such that an ordinarily careful person would anticipate that some injury to another might probably result therefrom. Indeed, that circumstance is an essential element of actionable negligence. With mere carelessness the law has no concern, unless it be such that some injury may be reasonably anticipated. But the rule that the question of fact must be passed upon by the jury is not without exception. In all of the cases above cited, such an exception is noted when the fact appears by necessary inference from the facts found, or from undisputed evidence. *Maitland v. Gilbert P. Co.* 97 Wis. 476, 487, 72 N. W. 1124. In line with this exception, in *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 203, 78 N. W.

446, 448, where the negligence consisted in constructing and maintaining a bridge found by the jury to be unsafe, it was remarked:

"When a train plunges through an unsafe bridge, there is little room to speculate on proximate cause. If the bridge was negligently and unsafely constructed, the destruction of a train and the loss of human life thereon must necessarily be contemplated by any reasonable man who built it. He cannot say that he did not anticipate an accident. Such a claim would be puerile. As well might a municipal corporation which has left an open pit in a street defend on the ground that it could not anticipate that a traveler would fall into it."

And that view was reaffirmed upon the second appearance of the same case in this court. 104 Wis. 473, 478, 80 N. W. 752. In *Evansville & T. H. R. Co. v. Carvener,* 113 Ind. 51, 53, 14 N. E. 738, 740, the court said:

"A defendant who, in violation of an express statutory duty, places or causes an obstruction in a public highway, will not be heard to say that he did not anticipate an injury which was the direct result of his unlawful act."

A very marked case of an unavoidable inference from the known facts that the element of proximate causation existed between the act of negligence and the injury is *Seaver v. Union,* 113 Wis. 322, 89 N. W. 163, where the plaintiff, either with knowledge of the approach of another team, or by negligent omission to inform himself of its approach, entered into a place in the highway where two teams could not pass each other without peril of injury, and, in turning out and returning to the highway, was capsized and injured. The court held that the relation of proximate cause between his negligence in entering into this space and the injury must be inferred by the court. It is not essential to the existence of actionable negligence, or of liability therefor, that a reasonably prudent person would have foreseen the exact injury which did result. It suffices that some injury to some person

might reasonably have been foreseen as likely to occur. 1 Shearm. & Redf. Neg. § 21. Viewing the present case in the light of the rules of law thus established, we are convinced that there is no room for difference of opinion as to whether, from the lack of skill, care, and precautions ordinarily exercised by physicians in treating or operating upon the highly sensitive portions of the feminine anatomy involved in the treatment in this case, an injury must be anticipated as likely to occur. To hold otherwise would involve a contradiction in ideas. It is the very peril of physical injury which necessitates a code of precautions in diagnosis and treatment by physicians and surgeons. They serve no other purpose. Taking for illustration the precautions to render an operation aseptic, such as described by the defendant himself, it is apparent and undisputed that they are adopted for no other reason than that every physician anticipates injury to the patient as probable in their absence. The whole field of discussion by the medical witnesses as to whether certain acts were or were not proper turned upon whether an ordinarily skilful and prudent surgeon would have anticipated injury therefrom. It is unreasonable to say that a physician may improperly and negligently excoriate the lining of a delicate internal organ, and escape liability by doubt as to whether he, in the exercise of reasonable care, should have anticipated injury to the patient thereby. The relationship between such an act of the physician and the physical condition of the patient is so intimate that he must necessarily anticipate some physical effect as the result of such operation, and, of course, that such effect will be bad if his act be improper or improperly done. The view above expressed is confirmed by the fact that in no decided case cited by counsel or found by us, nor in any textbook, is declared the necessity of any finding of this element of anticipation of injury from professional negligence in medical treatment or surgical operations. Uniformly, liability is made to depend on whether injury in fact resulted

from departure from recognized methods or omission of usual precautions. This seems to be true, also, of the cases decided by this court. Thus, in *Gates v. Fleischer,* 67 Wis. 504, 30 N. W. 674, the jury were instructed:

"If the defendant did not serve the plaintiff with the skill, prudence, care, and judgment before mentioned, and the plaintiff, without fault on her part which contributed thereto, was damaged by reason of defendant's said failure, she is entitled to recover for the damages sustained by her, and thus occasioned."

The same idea was reiterated more than once in the charge, which was declared by this court to be unexceptionable, although it is true that the necessity for anticipation of injury was not discussed. Again, in the very recent case of *Kiekhoefer v. Hidershide,* 113 Wis. 280, 89 N. W. 189, while the court defined "proximate cause" as including the idea of probability, yet he instructed the jury:

"In order to entitle the plaintiff to recover in this case, you must find the injury, or some of them, for which she now seeks to recover, was the proximate cause of such negligence [*sic*]; that is, Was such negligence, if you find there was negligence, the efficient or producing cause?"

The judgment in this case also was affirmed, though without discussion of the subject now in hand. The situation in the present case is clearly distinguishable from such as the *Maitland Case,* 97 Wis. 476, 72 N. W. 1124, where an incompetent employee improperly cut off steam and caused an explosion of a gauge, or the *Deisenrieter Case,* 97 Wis. 279, 72 N. W. 735, where, for the first time in the history of a brewery, gases escaped from one room into another, where plaintiff happened to be temporarily working, in sufficient quantity to injure him. In each of those cases reasonable minds might well differ as to the probability of any injury resulting from the negligent act. It does not seem to us that they can as to the probability of some injury from such im-

proper or negligent surgical operation and treatment as that presented in this case; hence a finding of the jury thereon was not necessary in this action, though it is not impossible that cases of malpractice might be presented wherein the proximate causation of injury should be passed on by the jury.

8. The tenth assignment of error is predicated upon certain instructions to the jury. The charge, while perhaps more prolix and containing more of repetition than was necessary or helpful to the jury, is, in the main, in general accordance with the rules of law as to the measure of duty and liability of a physician. While several exceptions were reserved, the appellant assigns and argues as error only two of these, except as to the question of proximate cause, already discussed. We shall therefore confine our consideration to those specific criticisms. The asserted vice in the first of these appears most strongly in the following quotation:

"A departure from approved methods in general use, if it injures the patient, will render him [the physician] liable, however good his intentions may have been."

This is criticised because it makes the physician liable in case he adopts new methods, although improved ones, and counsel suggest that no progress in medicine is possible if physicians must adhere to ancient methods; that vaccination or the use of anti-toxin, however wise and generally helpful, would, under that doctrine, have been malpractice originally. The instruction, viewed in the light of the rest of the charge, of course excludes the idea of liability for variations from customary practice merely in the way of increased precautions, recognized as such. Its only application, in the light of the evidence, must have been to the omission of precautions such as it was testified other physicians uniformly took, or in the deviation from such practice by making an operation of curettement under the circumstances presented. The argument made by counsel was met by the supreme court of

New York in *Carpenter v. Blake,* 60 Barb. 488, 523, with this remark:

"Some standard by which to determine the propriety of treatment must be adopted; otherwise experiments will take the place of skill, and the reckless experimentalists the place of the educated, experienced practitioner. . . . But when the case is one as to which a system of treatment has been followed for a long time, there should be no departure from it, unless the surgeon who does it is prepared to take the risk of establishing by his success the propriety and safety of his experiment. The rule protects the community against reckless experiments, while it admits the adoption of new remedies and modes of treatment only when their benefits have been demonstrated, or when, from the necessity of the case, the surgeon or physician must be left to the exercise of his own skill and experience."

This view has received support in other cases (*Slater v. Baker,* 2 Wils. 359; *Jackson v. Burnham,* 20 Colo. 532, 39 Pac. 577; *Patten v. Wiggin,* 51 Me. 594), and, we think, is substantially approved by this court in *Nelson v. Harrington,* 72 Wis. 591, 604, 40 N. W. 228, 233, where it was held that a so-called clairvoyant physician, pursuing peculiar methods of diagnosis and treatment, must be held to take the risk thereof. It was said:

"One who holds himself out as a medical expert, and accepts employment as a healer of disease, but who relies exclusively for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in an abnormal condition, in like manner takes the risk of the quality or accuracy of such influence or intuition."

We think the rule laid down by the court is supported by the weight of authority in cases where there can be said to be a thoroughly established and usual method of treating a situation. We have little doubt that, if the first case of vaccination had proved disastrous and injured the patient, the physician should have been held liable. Nor do we believe that a physician of standing and loyalty to his patients will subject

them to mere experiment, the safety or virtue of which has not been established by experience of the profession, save possibly when the patient is *in extremis* and fatal results substantially certain unless the experiment may succeed.

The further error assigned upon the charge is predicated upon a sentence or two used in pursuance of the preceding idea, where, in speaking of the failure to remove the abscess, the court said: "If . . . the defendant did not follow such established practice in the care and treatment of the case for the detection and removal of such abscess, recognized, adopted, and followed by all physicians and surgeons of good standing," etc., it would be negligence. Counsel merely complains of the use of the word "all," and seems to have the impression that it required defendant to have and exercise the skill of all the physicians residing in his neighborhood. This, however, is a direct perversion of the sentence. It declared his liability only in case he omitted a practice which was recognized and adopted by all, in this respect being probably more favorable to the defendant than was justified.

After a careful examination of all of the errors assigned and discussed, we find none which justifies us in a reversal of the present judgment. It was an extremely mixed question how far the plaintiff's suffering and permanent dismemberment and impairment of genital function were due to the improper treatment which the jury found she received from the defendant, and how far merely to her disease, but that some were attributable to the former cause might legitimately have been decided by the jury. Her injuries were grievous, but would hardly support a verdict for the amount rendered, but for the permanent injury above mentioned. With that before us, if it resulted from such improper treatment, it is impossible to say that the damages are excessive. The question of severing that suffering and those damages which were the natural consequence and result of plaintiff's diseased condition and those which were occasioned or enhanced by de-

fendant's improper treatment was especially one for the jury. They were duly cautioned against allowing damages for any of the former class, or for any which were due to disobedience of instructions or neglect on the plaintiff's part; and we cannot say that they have not correctly resolved these questions of fact, wholly within their province.

By the Court.—Judgment affirmed.

CULLEN, Respondent, vs. HANISCH, Appellant.

March 11—April 1, 1902.

Malicious prosecution: Security for costs: Appealable order: Evidence: Witnesses: Cross-examination: Impeachment: Hearsay: Special verdict: Practice: Probable cause: Instructions to jury.

1. Under sec. 2942, Stats. 1898, providing that any court of record in which a civil action may be pending may, in all cases where it shall appear reasonable and proper, require the plaintiff to give security for such costs as may be awarded against him, an application for an order requiring security for costs is addressed to the sound discretion of the trial court.
2. No appeal lies from such order, it not being enumerated in sec. 3069, Stats. 1898, as one of the orders from which an appeal may be taken.
3. On cross-examination of a party he was asked if a part of the time he had lived in a certain locality he had not been in jail. It did not appear, and the witness was not asked, whether he had ever been convicted of any criminal offense. *Held*, that the exclusion of such question was not error. Sec. 4073, Stats. 1898, authorizes proof of conviction of a criminal offense for the purpose of affecting the witness's "credibility, either by the record or by his own cross-examination," and the mere fact of his having been in jail is without significance.
4. It is not error to exclude a question put to a party on cross-examination, as to whether some years before six witnesses had testified that his reputation for truth and veracity was bad. Such testimony is hearsay and not legitimate cross-examination, and not a proper way of impeaching the party as a witness in his own behalf.

5. It is not error to refuse to allow an impeaching witness to testify that, in another cause in which the plaintiff was a witness, he found eighteen witnesses who would not believe him under oath.
6. In an action for malicious prosecution the important issue on the trial was, whether the defendant procured the arrest of the plaintiff maliciously and without reasonable or probable cause to believe him guilty of the offense with which he was charged. Upon one of the questions submitted as part of a special verdict, the court instructed the jury: "If you find from the evidence that there was a general rumor . . . known to the defendant before the commission of said alleged offense . . . then you may take into consideration such fact, with the other evidence in the case, on the question of probable cause, and on the question of the defendant's acting in good faith and without malice." Defendant assigned as error the refusal to submit, as part of the special verdict, the question: "Was there a rumor in W., at the time the plaintiff was arrested on the charge of removing and concealing chattel-mortgaged property, that he was guilty thereof?" *Held*, not error, the question of general rumor having been by said instruction submitted to, and necessarily considered by the jury in its answer to the question of the special verdict submitted.
7. Under sec. 2858, Stats. 1898, requiring the trial court to "direct the jury to find a special verdict . . . in the form of questions, in writing, relating only to material issues of fact, and admitting a direct answer, to which the jury shall make answer in writing," the form of the verdict is in the discretion of the court, subject to the qualification that it must be limited to such questions of fact as are controverted and put in issue by the pleadings, or, at most, to such as might properly have been put in issue thereby.
8. A special verdict is not designed to elicit from the jury a mere abstract of the evidence, and questions relating merely to evidentiary facts are erroneous.
9. In framing a special verdict it is error to split up important questions put in issue by the pleadings into a number of minor questions, the determination of some of which settle nothing so put in issue.
10. In an action for malicious prosecution, it is error to submit by separate questions, whether the defendant instituted the prosecution maliciously, and also whether he procured the warrant to be issued maliciously.
11. In an action for malicious prosecution, it is error to refuse to instruct the jury that the burden of proof to show want of probable cause was upon the plaintiff.

12. In actions for malicious prosecution, probable cause or want of probable cause necessarily depends upon what the prosecuting party knew or ought to have known at the time of instituting the criminal prosecution, and hence, in the absence of a certificate of the magistrate, under secs. 4760, 4791, Stats. 1898, that the complaint in the criminal action was wilful and malicious and without probable cause, the acquittal is not *prima facie* evidence of the want of probable cause. *Bigelow v. Sickles*, 80 Wis. 98, distinguished.
13. In such action it is not error to refuse to instruct the jury that "the fact that plaintiff was discharged upon his trial in the criminal case is not conclusive evidence of want of probable cause." The instruction should have been, "The acquittal of plaintiff in such criminal action is no evidence of want of probable cause."
14. In submitting a special verdict it is error to inform the jury what would entitle plaintiff to recover, and, by grouping several questions together under general instructions, fail to charge the jury with instructions appropriate to each question.

APPEAL from a judgment and an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Judgment reversed; appeal from order dismissed.*

This is an action for damages for malicious prosecution, commenced November 26, 1900. The complaint alleges, in effect, that October 2, 1900, the defendant maliciously and without reasonable or probable cause made complaint on oath before a justice of the peace, charging the plaintiff with having on that day, in the city of Waupun, concealed, removed, and driven away a certain brown stallion, named "Suzerain," after having conveyed the stallion to the defendant by chattel mortgage, and during the existence of the lien thereon and title thereto created by the mortgage, and without the consent of the defendant as such mortgagee, and with the intent to defraud the defendant, and thereupon procured and caused to be issued by such justice a warrant reciting the substance of such complaint, and upon which the plaintiff was upon the day named arrested and taken before such justice; that the plaintiff thereupon caused the venue to be changed to another justice, on the ground of prejudice; that the plaintiff

was then imprisoned for one day by such other justice, and held to bail in the sum of $150; that a trial was duly had before such other justice November 3, 1900, and it appeared thereon that the offense charged had not been committed; and that the plaintiff was thereupon discharged,—and claimed $1,000 damages.

The defendant answered by way of admissions, denials, and counter allegations, and especially denied that such complaint before the justice was made maliciously or without reasonable or probable cause, and alleged, in effect, that the complaint was made upon the advice of counsel, to whom he fully and fairly stated the case, and that such complaint was made in good faith, firmly believing that the statements therein contained were true, and that just before and at the time of making such complaint there was a general rumor in the vicinity where such offense was alleged to have been committed that the plaintiff was guilty thereof.

On January 14, 1901, the defendant moved the court for an order requiring the plaintiff to give security for costs, which was denied, with $5 costs against the defendant. It is admitted that the plaintiff executed and delivered to the defendant the chattel mortgage mentioned, May 6, 1899, upon the stallion and other property, to secure his note executed at the same time for $150, payable May 6, 1900; but the plaintiff claimed that it was fully paid prior to his arrest, and that fact was denied by the defendant, who insisted that it was unpaid and a valid and subsisting mortgage.

At the close of the trial the jury returned a special verdict to the effect (1) that the criminal prosecution commenced by the defendant against the plaintiff was terminated before the commencement of this action; (1½) that the indebtedness secured by the chattel mortgage in question was paid before the commencement by the defendant of the criminal prosecution against the plaintiff; (2) that the motive of the defendant in instituting the prosecution complained of was malicious; (3) that the defendant, in procuring the warrant in

question to be issued, acted maliciously; (4) that the defendant, in procuring the warrant in question to be issued, acted without probable cause for so doing; (5) that the defendant, in commencing the criminal prosecution against the plaintiff, acted without probable cause; (6) that the defendant, before commencing the criminal prosecution against the plaintiff, did not make a full, fair, and honest statement of all the material facts bearing upon the question of the plaintiff's guilt of the offense alleged against him to an attorney at law, for the purpose of procuring legal advice thereon; (7) that the defendant, in making such statement, withheld from the attorney some material fact to his knowledge bearing upon the question of the plaintiff's guilt of the offense charged against him; (8) that the defendant, in commencing the criminal prosecution in question, did not act in good faith upon the advice of counsel; (9) that the defendant, in commencing the criminal prosecution in question, acted upon his own judgment; (10) that the defendant did not commence the criminal prosecution against the plaintiff under the honest belief that the plaintiff was guilty of the offense charged against him; (11) that such belief of the defendant was not founded upon facts and circumstances sufficient to produce in the mind of a reasonable and prudent man such a serious suspicion of the plaintiff's guilt of the offense charged against him as to repel the idea that he was actuated by malice; (12) that they assessed the plaintiff's actual damages at $200, and his exemplary damages at $125, making in all $325.

Judgment was thereupon entered in favor of the plaintiff for $325 damages and $80.62 costs. From that judgment the defendant brings this appeal. He also appeals from the order refusing security for costs.

For the appellant the cause was submitted on the brief of *C. E. Hooker.*

For the respondent there was a brief by *Ned. Roney* and *M. L. Lueck,* and oral argument by *Mr. Lueck.*

CASSODAY, C. J. Error is assigned because the court refused to require the plaintiff to give security for costs. The statute provides:

"Any court of record in which a civil action may be pending may, in all cases where it shall appear reasonable and proper, require the plaintiff to give sufficient security for all such costs as may be awarded against him therein." Sec. 2942, Stats. 1898.

Upon the showing made, the court might properly have granted the defendant's motion, and required the plaintiff to give security for costs. But the motion was under the statute, as repeatedly construed by this court, addressed to the sound discretion of the trial court, and we cannot say that there was an abuse of such discretion. *Heeron v. Beckwith,* 1 Wis. 17; *Joint School Dist. v. Kemen,* 72 Wis. 179, 39 N. W. 131. Besides, the order is not appealable. Sec. 3069, Stats. 1898.

2. It is claimed that the verdict is against the weight of evidence. But that question was for the jury to determine. We cannot say that there is no evidence to sustain the verdict,—much less, that it is contrary to the evidence.

3. Error is assigned for the exclusion of testimony. The plaintiff, after testifying on his direct examination that when he was arrested he was put in the city lockup, and on his cross-examination that he had lived in Waupun for two years, and before that a year or so at Beaver Dam, and before that a year and a half at Columbus, was asked this question: "A part of that time you were in jail, were you not?" Error is assigned because that question was excluded. We find no error in such ruling. It did not appear, and he was not asked, whether he had ever been convicted of any criminal offense. The statute authorized the proof of such conviction to affect the plaintiff's "credibility, either by the record or by his own cross-examination." Sec. 4073, Stats. 1898. The mere fact of being in jail would be without significance. Nor can

we say it was error not to require him to answer on cross-examination whether on his divorce trial, some years before, six witnesses had not testified that his reputation for truth and veracity was bad and that they would not believe him under oath. It was, at most, hearsay, and not legitimate cross-examination, nor a proper way of impeaching the plaintiff as a witness in his own behalf. 1 Greenl. Ev. (15th ed.), §§ 461–469. Certainly there was no error in not allowing the defendant's impeaching witness Rowell to testify that upon a former trial of a case in which he was interested and the plaintiff was a witness, he found eighteen witnesses who would not believe the plaintiff under oath. Such testimony would have been the merest hearsay.

4. Error is assigned because the court refused to submit to the jury this question: "Was there a general rumor in Waupun, at the time the plaintiff was arrested on the charge of removing or concealing chattel-mortgaged property, that he was guilty thereof?" In support of such contention, counsel cite the statute which requires the trial court to "direct the jury to find a special verdict . . . in the form of questions, in writing, relating only to material issues of fact, and admitting a direct answer, to which the jury shall make answer in writing." Stats. 1898, sec. 2858. That statute has frequently been construed to "limit such questions to such facts as are controverted and put in issue by the pleadings, or, at most, to such as might properly have been put in issue by the pleadings." *Heddles v. C. & N. W. R. Co.* 74 Wis. 258, 42 N. W. 237, and cases there cited. But the form of the verdict in all such cases is very much in the discretion of the trial court. *Id.; Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 362, 77 N. W. 714. The important issue on the trial was whether the defendant procured the arrest of the plaintiff maliciously and without reasonable or probable cause to believe he was guilty of the offense, under the statute, of which he was charged. Sec. 4467, Stats. 1898. The fact whether

there was such general rumor of the plaintiff's guilt at the time was simply a matter of evidence, bearing upon the question whether the defendant procured the arrest maliciously and without reasonable or probable cause. Upon the fifth question submitted, the court charged the jury on the subject of probable cause, and, among other things, said:

"If you find from the evidence that there was a general rumor in the city of Waupun, known to the defendant before the commission of said alleged offense by the defendant, then you may take into consideration such fact, with the other evidence in the case, on the question of probable cause, and on the question of the defendant's acting in good faith and without malice."

The question of general rumor was thus submitted to, and necessarily considered by, the jury, in answering that question.

5. This court has many times declared that such special verdict was not designed to elicit from the jury a mere abstract of the evidence. *Eberhardt v. Sanger,* 51 Wis. 72, 76, 8 N. W. 111; *Heddles v. C. & N. W. R. Co.* 74 Wis. 258, 42 N. W. 237; *Ohlweiler v. Lohmann,* 88 Wis. 78, 59 N. W. 678; *McKeon v. C., M. & St. P. R. Co.* 94 Wis. 486, 69 N. W. 175; *Goesel v. Davis,* 100 Wis. 678, 76 N. W. 768. And yet a number of the questions submitted related merely to such evidentiary facts, and hence were erroneous.

6. For many years this court has sought to limit questions submitted in special verdicts to such facts, as far as practicable, as are controverted and put in issue by the pleadings. A quarter of a century ago, Chief Justice RYAN tersely stated that:

"The statute providing for special verdicts is an excellent one, tending to dispel the occasional darkness visible of general verdicts. But special verdicts are worse than useless if courts do not submit for them single, direct, and plain questions, and insist upon positive, direct, and intelligible answers. Indirect, evasive, uncertain and unmeaning an-

swers should never be received. And when none other can be drawn from a jury, the verdict should not stand for a moment." *Carroll v. Bohan,* 43 Wis. 221.

That language is just as potential now as when first announced. Had it been faithfully followed, many of the cases which have come to this court would have terminated in the trial court. It has been heeded by some trial courts, but widely departed from in others, though frequently enjoined by this court, either in the same or similar language, or language of a like import. *Eberhardt v. Sanger,* 51 Wis. 74, 8 N. W. 111; *Murray v. Abbot,* 61 Wis. 198, 203, 20 N. W. 910; *Heddles v. C. & N. W. R. Co.* 74 Wis. 257, 258, 42 N. W. 237; *Montreal River L. Co. v. Mihills,* 80 Wis. 558, 50 N. W. 507; *Farley v. C., M. & St. P. R. Co.* 89 Wis 206, 208, 61 N. W. 769; *McGowan v. C. & N. W. R. Co.* 91 Wis. 147, 158, 64 N. W. 891; *Klochinsky v. Shores L. Co.* 93 Wis. 423, 424, 67 N. W. 934; *Louis F. Fromer & Co. v. Stanley,* 95 Wis. 59, 69 N. W. 820; *Baxter v. C. & N. W. R. Co.* 104 Wis. 317, 80 N. W. 644; *Peake v. Superior,* 106 Wis. 407, 408, 82 N. W. 306; *Sladky v. Marinette L. Co.* 107 Wis. 257, 83 N. W. 514; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816. As stated in a recent case:

"Questions for a special verdict should be plain, single, and each so worded as to cover some fact in issue, or some fact properly issuable under the pleadings, and requisite to a determination of the controversy between the parties." *Goesel v. Davis,* 100 Wis. 679, 76 N. W. 768.

In a still more recent case it is said:

"The object of a special verdict is solely to obtain a decision of issues of fact raised by the pleadings, not to decide disputes between witnesses as to minor facts, even if such minor facts are essential to and establish, by inference or otherwise, the main fact." *Baxter v. C. & N. W. R. Co.* 104 Wis. 313, 80 N. W. 644.

These numerous cases are cited, not because there is any difficulty in comprehending the statutory rule so often ap-

plied, but because in some jurisdictions such rule does not seem to be understood. Here the important question so put in issue by the pleadings was split up into a number of minor questions, the determination of some of which settled nothing so put in issue by the pleadings. Thus the jury were required to determine whether the defendant instituted the prosecution maliciously, and also whether he procured the warrant to be issued maliciously. And yet in another connection the jury were told:

"Both malice and the absence of probable cause must exist concurrently to make a case of malicious prosecution. Absence of probable cause is a complete defense. . . . If you find from the evidence that the defendant had probable cause for believing, and did believe, that the plaintiff had committed the criminal offense referred to, then he was not precluded from making complaint for the same before a justice of the peace, even if you should find from the evidence that he had malice against the plaintiff."

This court has held:

"An action for malicious prosecution cannot be maintained, even though express malice be shown, if the defendant had good reason to believe, and did believe, when he made complaint, that the plaintiff had committed the offense charged." *Murphy v. Martin,* 58 Wis. 276, 16 N. W. 603.

To the same effect, *Strehlow v. Pettit,* 96 Wis. 22, 27, 71 N. W. 102; 2 Greenl. Ev. (15th ed.), §§ 453, 454. It is there said by Mr. Greenleaf that want of probable cause "is independent of malicious motive, and cannot be inferred, as a necessary consequence, from any degree of malice which may be shown."

The court improperly refused to charge the jury that the burden of proof to show that there was no probable cause was upon the plaintiff. This was error. *Messman v. Ihlenfeldt,* 89 Wis. 591, 62 N. W. 522.

7. The answer to the first question submitted was directed

and in fact inserted by the court, to the effect that the criminal prosecution had been terminated before the commencement of this action. The court properly refused to charge the jury that "the fact that plaintiff was discharged upon his trial in the criminal case is not conclusive evidence of want of probable cause." Had the court so instructed the jury, they might have inferred that such discharge was *prima facie* evidence of want of probable cause. The furthest this court has gone on that question is to hold that "the judgment of a justice of the peace discharging a person on the examination upon a criminal complaint is *prima facie* evidence against the complainant of want of probable cause for the prosecution." *Bigelow v. Sickles,* 80 Wis. 98, 49 N. W. 106. In that case the committing magistrate, sitting as a court, after hearing testimony, found that no offense had been committed, and the prisoner was discharged; and the court further found, and thereby certified, that the complaint therein was wilful and malicious and without probable cause, and thereby rendered judgment in favor of the state and against the complainant for costs in such proceeding, and taxed the same at $106.58. Such finding and certificate of the committing magistrate were in compliance with the statutes. Secs. 4760, 4791, Stats. 1898. In the case at bar it is alleged that the criminal complaint was made by the defendant herein maliciously and without reasonable or probable cause, and that a trial was duly had before the justice, and that "it appeared upon the whole thereof that no offense such as charged, nor any kind, had been committed, and that there was not probable cause for charging plaintiff with the same, and that the plaintiff was thereupon discharged." The answer denied each and every of such allegations, except that such complaint was made and trial had thereon and that the plaintiff was discharged, and alleged that the complaint was made in good faith. Manifestly the plaintiff was tried and acquitted. There is no proof in the record to show any such

finding of the justice as in *Bigelow v. Sickles, supra,* or as required by the sections of the statute cited. Such discharge of the plaintiff could not properly be regarded even as *prima facie* evidence of want of probable cause. 2 Greenl. Ev. (15th ed.), § 455; Newell, Mal. Pros. 289, § 19. In another connection the author last cited says that:

"A want of probable cause is not shown by the acquittal of the accused. If such were the rule, but few, if any, would dare make an effort to enforce the criminal laws of a state. To do so would involve the prosecuting witness, wherever the prosecution failed, in vexatious litigation and loss, and none could be expected to incur such hazards. Prosecuting witnesses must be protected where they act in good faith on facts and circumstances which are such as induce a belief of guilt in the mind of a reasonable person. This has always been the rule of the law. The issue for the jury or the court to try is not the guilt of the plaintiff. If the defendant act in good faith on evidence, whether true or false, which is sufficient to create a reasonable belief that the accused is guilty of the offense, he is protected." Sec. 20, p. 294.

Thus it is held in Connecticut that "a discharge of the plaintiff is essential to his recovery, but it is not proof of want of probable cause, nor of malice." *Thompson v. Beacon Valley R. Co.* 56 Conn. 493, 16 Atl. 554. To the same effect, *Anderson v. Friend,* 85 Ill. 135; *Boeger v. Langenberg,* 97 Mo. 390, 11 S. W. 223. In this last case it was held that "an acquittal does not tend to establish want of probable cause in moving the prosecution." So it has been held in Iowa that "an acquittal upon the final trial of criminal proceedings raises no presumption of a want of probable cause in an action for malicious prosecution." *Philpot v. Lucas,* 101 Iowa, 478, 70 N. W. 625.

In the light of these authorities, it is very obvious that the court should have charged the jury, as requested, that "the acquittal of the plaintiff in such criminal action is no evidence of want of probable cause." In the section of Green-

leaf, Ev. cited above, the rule is tersely stated thus: "Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting." Among the cases cited in support of such rule is one where Mr. Justice COLERIDGE states "that reasonable and probable cause must be that which exists in the mind of the party at the time of the act in question." *James v. Phelps,* 11 Adol. & E. 483, 489. And another where it is held "that, if the defendant preferred the indictment with the consciousness that he was in the wrong in the transaction, there was no reasonable or probable cause for the indictment." *Hinton v. Heather,* 14 Mees. & W. 131. See, also, *Delegal v. Highley,* 3 Bing. N. C. 950; *Seibert v. Price,* 5 Watts & S. 438; *Plummer v. Gheen,* 3 Hawks, 66. Probable cause or want of probable cause necessarily depends upon what the prosecuting party knew or ought to have known at the time of instituting the criminal prosecution.

8. By splitting up the principal issue made by the pleadings the charge of the court was much less helpful, if not misleading and confusing. Thus in charging the jury upon the second question submitted, which related wholly to the defendant's motive and malice, the court charged the jury on the want of probable cause. The third question related to malice on the part of the defendant, and the fourth and fifth related to want of probable cause at different stages of the proceedings, but in charging the jury they were all grouped together; and the charge thereon related to want of probable cause and evidence of good faith, and referred back to the instructions which had been given upon malice, as not being necessary to repeat. So, in charging the jury, the sixth, seventh, and eighth questions submitted, all relating to the advice of counsel, were grouped together; the court again going over both malice and want of probable cause, a portion of which has been quoted above. The ninth question was of a kindred nature, but was submitted without instruction. The

tenth and eleventh questions related to the defendant's good faith, and both were submitted without instruction. Besides, prior to submitting any of the questions the court charged the jury generally and, among other things, informed them what would entitle the plaintiff to recover. Such methods of charging the jury are in direct conflict with several recent decisions of this court, commencing with *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 223, 78 N. W. 442. As there stated by Mr. Justice WINSLOW, that such method of charging the jury "is the very thing which the special verdict is intended to prevent is evident from the law itself. The special verdict was expressly intended to submit to the jury for answer certain questions of fact, which they are to answer from the evidence, guided by instructions appropriate to the questions only, without regard to the legal effect of their answers upon the ultimate question of the rights of the parties. Thus it was expected and intended to relieve the jury from all consideration as to whether their answers are consistent with a general recovery by either party, and thus to obtain a result, as far as possible, free from sympathy or prejudice." *Schaidler v. C. & N. W. R. Co.* 102 Wis. 564, 571, 78 N. W. 732; *New Home S. M. Co. v. Simon,* 104 Wis. 120, 80 N. W. 71; *Brunette v. Gagen,* 106 Wis. 618, 82 N. W. 564; *Rhyner v. Menasha,* 107 Wis. 206, 83 N. W. 303; *Sladky v. Marinette L. Co.* 107 Wis. 259, 83 N. W. 514; *Musbach v. Wis. C. Co.* 108 Wis. 70, 84 N. W. 36; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703. There was clearly a mistrial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial. The appeal from the order refusing security for costs is dismissed.

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ZAHN, Respondent, vs. MILWAUKEE & SUPERIOR RAILWAY COMPANY, Appellant.

March 11—April 1, 1902.

Railroads: Appeal and error: Motion for new trial, when not necessary: Practice: Master and servant: Negligence: Personal injuries: Presumptions.

1. Where there has been a motion for a direction of a verdict with due exception properly preserved in the record, the supreme court will review the evidence in order to determine whether the motion should have been granted.
2. In such case a motion for a new trial is not necessary.
3. Plaintiff, a railway brakeman, was injured while coupling cars. The train crew consisted of plaintiff, two other brakemen, and the fireman, the engineer being absent. One of the other brakemen signaled to the fireman to back to make a coupling, and two cars were coupled, one by such brakeman, and the other by plaintiff, who then went to a third car to adjust the coupling, and, the engine continuing to back, plaintiff's hand was caught and crushed. It appeared that it was a custom on defendant's road, under such circumstances, for the engine to continue backing until a signal was given to stop. Plaintiff had been in defendant's employ for seven or eight years, and was familiar with its manner of operating trains. The fireman testified that he did not know that plaintiff was making a coupling. No signal to stop was given to the fireman by any one. *Held*, that plaintiff must be presumed to have known of the custom mentioned, and, knowing it, to have assumed the usual and ordinary risk incident thereto.
4. In such case it cannot be said that the fireman was negligent.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action under sec. 1816, Stats. 1898, to recover damages for personal injuries claimed to have been sustained by plaintiff while in the discharge of his duties as brakeman for defendant. The accident occurred a little after noon on November 3, 1899. The plaintiff was engaged in coupling cars on a side track in the yard at North Lake station. The negligence alleged is that the fireman, who was in charge of the engine

while the engineer was at dinner, backed the engine, with several cars attached, without any signal from plaintiff, and without any notice or signal to plaintiff, suddenly against a car that plaintiff was preparing with coupling links, and caught and crushed his hand. A motion for a nonsuit at the close of plaintiff's testimony was denied, as was also a motion to direct a verdict for defendant at the close of the testimony. Both rulings were duly excepted to.

A special verdict was submitted, in which the jury found substantially as follows: (1) That plaintiff was injured while in defendant's employment; (2) that he was injured by having his right hand caught between the bumpers of the cars; (3) that the fireman was in charge of the engine; (4) that the engine and cars attached to it were pushed back against the car the plaintiff was preparing for coupling without any signal from plaintiff; (5) that the engine and cars were so pushed back without any notice to plaintiff; (6) that they were pushed back without any knowledge on the part of plaintiff; (7) that plaintiff was engaged in the capacity of brakeman; (8) that plaintiff was not then employed in the capacity of conductor; (9) that the plaintiff had no knowledge of the absence of the engineer; (10) that plaintiff did not notify the fireman he was going between the cars; (11) that plaintiff did not see the approaching car in time to have removed his hand from between the two drawbars; (11½) that plaintiff did not hear the approaching engine and cars in time to have removed his hand; (12) that plaintiff was not injured in consequence of a movement of the cars in the usual and ordinary manner; (13) that the condition of the coupling apparatus was not the sole and proximate cause of plaintiff's injury; (14) that plaintiff was injured by the negligence of the fireman in charge of the engine; (14½) that a person of ordinary care, under the circumstances, should not have known that the engineer was absent from the engine; (15) that plaintiff was not guilty of any want of ordinary

care which contributed directly to produce the injury; (16) that the defendant's employee was guilty of negligence which was the natural probable cause of the accident, and which accident ought to have been foreseen by a person of ordinary care and prudence; (17) damages, $2,500.

Defendant submitted a motion "for an order setting aside the answers to questions numbered, respectively, 12, 14, 14½, 15, and 16, in the special verdict rendered by the jury herein, for the reason that the same are unsupported by the evidence, and are against the uncontradicted evidence, and changing and perfecting the said special verdict in accordance with the uncontradicted evidence by answering question number twelve 'Yes,' question number fourteen 'No,' question number fourteen and one-half 'Yes,' question number fifteen 'Yes,' and question number sixteen 'No,' and granting judgment in favor of the defendant and against the plaintiff on the said special verdict as so changed and perfected, and upon the uncontradicted evidence." This motion was denied, and plaintiff's motion for judgment was granted. Defendant's appeal is from the judgment.

For the appellant there was a brief by *Spooner & Rosecrantz,* and oral argument by *C. P. Spooner.*

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan.*

BARDEEN, J. The plaintiff argues that, inasmuch as there was no motion for a new trial, the only question to be considered is whether there is any evidence to support the findings challenged. So far as relates to a decision of the question raised by the denial of the motion for a nonsuit, many of the cases say that, in absence of a motion for a new trial, the court will not review the evidence. The rule in this regard is sufficiently stated in *Guetzkow v. Smith,* 105 Wis. 94, 80 N. W. 1109. It rests upon the fact that evidence may have been admitted before the close of the trial sufficient to

warrant a submission of the case to the jury. But when there has been a motion for a direction of a verdict, with due exception preserved in the record, the rule is different. In such a situation this court will review the testimony in order to determine whether the motion should have been granted. *Second Nat. Bank v. Larson,* 80 Wis. 469, 50 N. W. 499; *Plankinton v. Gorman,* 93 Wis. 560, 67 N. W. 1128; *McGinn v. French,* 107 Wis. 54, 82 N. W. 724.

The points made by defendant are that the undisputed evidence shows that the engine was being operated in the usual and ordinary manner, and that the plaintiff was guilty of contributory negligence as a matter of law. The negligence upon which plaintiff's claim of recovery is based is that the engine and cars attached were pushed back against the car which plaintiff was preparing for coupling without a signal from or warning to the plaintiff. The evidence shows that at the time of the injury the engine was in charge of plaintiff's brother, who was the fireman. The engineer had gone to his dinner, and the fireman was operating the engine. The train crew then consisted of the fireman, the plaintiff, and two other brakemen. There were several cars on the side track near the east end, which were not coupled together. The evidence is somewhat vague as to their exact location. The engine was backed in on the switch at the east end. The brakeman, Sykes, gave a signal to back up to make a coupling, and two cars were coupled, Sykes making one and the plaintiff the other. There was yet one car to be attached, about two car lengths distant. Plaintiff ran to the stationary car to adjust a link for the coupling. While so engaged, the engine, with the cars attached, continued backing west, and plaintiffs fingers were caught between the bumpers and crushed. The undisputed evidence shows that it was the custom on defendant's road that when a signal is given to the person operating the engine to move backward to make a coupling to continue

backing until a signal to stop is given. The brakeman, Sykes, gave a signal to move backward, and two couplings were made. The engine continued moving slowly backward without any signal to stop until after plaintiff was injured. This was in conformity to the usual custom of the road. The plaintiff had been in the employ of defendant seven or eight years, and had had charge of a train for a year or two before the accident. He was familiar with the manner of operating its trains, and must be presumed to have known of the custom mentioned. Moreover, it is to be noted that after the engine had been cut off from the cars on the main line the plaintiff had not been in touch with the acting engineer in any way whatever. The signal for the movement of the engine had been given by the brakeman, Sykes, and the couplings made were in obedience to his directions. The fireman testified that he did not know his brother was making a coupling. In view of this fact, it is difficult to see any basis for the plaintiff's recovery. The engine was being handled and moved strictly in accordance with the established custom of the road. The plaintiff certainly knew of such custom, and, knowing it, assumed the usual and ordinary risk incident thereto. It is also difficult to see any ground for saying that the acting engineer was negligent. If he did not know the plaintiff was making a coupling, he was not bound to give him a warning or to make a signal as the cars were moving. No ground is apparent for saying that he ought to have known the plaintiff was between the cars. There is no room for conflicting inferences from the facts disclosed. They all point one way. The jury, by its twelfth finding, say that plaintiff was not injured in consequence of a movement of the cars in the usual and ordinary way. The only testimony on the subject given by plaintiff's brother and the superintendent of the road was directly contrary to this finding. By the fourteenth finding they say plaintiff was injured by the negligence of the fire-

man in charge of the engine. Assuming the engine was being run in the usual and ordinary manner, we look in vain for anything in the record to support this conclusion. Without some showing upon which the finding of negligence can rest, there is no foundation for the verdict, and the other findings become immaterial. We may say, in passing, that the finding against plaintiff's contributory negligence has very little in the record to warrant it. The court should have granted defendant's motion to direct a verdict. Not having done so, it was his duty to have corrected the answers of the jury in the special verdict, and to have rendered judgment for defendant. *Menominee River S. & D. Co. v. M. & N. R. Co.* 91 Wis. 447, 65 N. W. 176; *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis. 243, 70 N. W. 486; *Keller v. Schmidt,* 104 Wis. 596, 80 N. W. 935; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 85 N. W. 1036.

By the Court.—The judgment is reversed, and the cause is remanded with directions to the circuit court to correct the verdict by changing the answer to the twelfth question from "No," to "Yes," and the answer to the fourteenth question from "Yes," to "No," and the answer to the sixteenth question from "Yes," to "No," to conform to the facts, and to render a judgment on the verdict as so corrected in favor of defendant for costs.

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61 LRA 672

DIANA SHOOTING CLUB, Appellant, vs. LAMOREUX, Respondent.

March 11—April 1, 1902.

Constitutional law: Title of legislative act: Local act: Private act: Legislative discretion: Corporations: Public lands: Mills and mill dams: Flooding of public domain: Swamp land act of 1850: Waters and watercourses: Navigable lakes: Artificial level of lakes: Statute of limitations: Trespass: Fishing and hunting: Hunting license.

1. As regards sec. 18, art. IV, Const., the statement of a subject in the title of a legislative enactment is deemed to constitutionally suggest all the details thereof, including everything found in the body of the act which facilitates its object.
2. The constitution does not require the title of a private or local legislative act to go further than to express the subject covered by the body of the law. It leaves the method of expressing such subject to legislative discretion, within all reasonable boundaries.
3. The statement of a primary purpose in general terms in a constitutional sense reasonably includes all the means designed to facilitate the accomplishment thereof.
4. The statement of the primary object of a legislative enactment as being the creation of a corporation for manufacturing purposes, within the meaning of the constitutional provision above mentioned suggests, as germane thereto and as part of the single purpose intended and expressed, authority to acquire and maintain a dam to create power for the use of the corporation, also to acquire lands affected by the backwater from the dam, and authority to the owners of such lands to sell the same to the corporation.
5. Artificial flooding of lands in the public domain of the United States does not affect the title thereto.
6. The federal swamp land act of 1850 vested in the state, as of the date the act took effect, the title to all lands determined by the general land department of the United States to be affected thereby. The decision of such land department on that question is conclusive except against persons claiming under a paramount title.
7. Lands of the United States, at the date of the swamp land act of 1850, approved by the proper officers of the general land department as being lands of the character intended to be

granted thereby, were, by such act and approval, segregated from the public domain and vested in the state, regardless of whether they were, at the date of such act, artificially covered by navigable water, by trespasses upon such domain.

8. The rule that an artificial condition of water may, by lapse of time, become a natural condition as regards public rights, does not apply in the absence of any element necessary to change the title to the land by the operation of the statute of limitations.

9. A wrongful invasion of the right to use land for fishing and hunting is actionable regardless of the amount of the damages caused by such invasion.

10. Every wrongful intrusion by one person upon the legal rights of another is both an injury and a damage and is a proper subject for legal redress.

11. A state license to hunt does not confer any right upon the holder thereof to go upon lands owned by private parties without their permission.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action to recover damages for trespassing upon an alleged exclusive right to hunt on certain lands. The title to the lands was put in issue by the pleadings. Plaintiff's right to recover turned on whether it possessed the right claimed. Defendant insisted that the lands were formerly the bed of a lake, and that the state had never parted with its title thereto.

The following facts were disclosed by the evidence, and are covered, in the main, by the findings of the court: Plaintiff is a corporation organized for the purpose of hunting. It has existed since prior to September 2, 1900. On that day defendant, who possessed a hunter's license from the state, went upon the lands in dispute for the purpose of enjoying the same. While he was so doing he tramped down some grass and did the acts complained of. The land entered upon by defendant is a part of what is known as "Horicon Marsh." It was once a part of the bed of what was known as "Horicon Lake." The lake, so called, covered about 19,000 acres of

land. The United States survey, made in 1837, included Horicon Marsh as a part of the public domain. The lake was created by the flooding of the marsh by means of a dam constructed across Rock river in 1846. The lake existed continuously thereafter until 1868. The dam was then destroyed and the lands were thereby uncovered and restored substantially to their original condition. All of the marsh lands were conveyed to the state of Wisconsin under the United States swamp land act of 1850. By ch. 454, P. & L. Laws of 1867, an attempt was made to create a corporation known as the "Mechanics' Union Manufacturing Company," and to empower it to maintain the dam aforesaid and acquire from the state its title to said overflowed lands. The title of the act is as follows: "An act to incorporate the Mechanics' Union Manufacturing Company." In and by said act commissioners were provided for, to appraise the property right of the state in said overflowed lands; they were withdrawn from the general market, and the corporation was given the exclusive right to acquire the same at the appraised value thereof at any time within two years from the time of the passage of the act. The lands were appraised as directed by said act and in due time and form of law were, at their appraised value, conveyed to said corporation. During all the time of the existence of the artificial lake, which covered a period of more than twenty years, it was a navigable body of water. At the time of the alleged wrong, plaintiff possessed all the right to go upon the premises in question to hunt which the state conveyed to the Mechanics' Union Manufacturing Company in the attempted conveyance of the fee title to said lands. Plaintiff's right was in the form of a grant in writing for a consideration for a fixed term of years to use the premises, subject to the reserved right of cutting grass and pasturing stock.

From such facts the court decided that the act of 1867 was unconstitutional and void; that the state never acquired any

proprietary right in the lands covered by the waters of Horicon lake; that when the state was admitted into the Union said lands were lake bed the same as land forming the bed of a natural lake, and that the title thereto passed to the state at that time in trust, in all respects the same as any lands under its navigable waters; that the state never possessed any proprietary right in said lands, hence that it was powerless to make any conveyance thereof to the Mechanics' Union Manufacturing Company; that plaintiff, at the time of the alleged trespass did not have any exclusive right to the possession of the premises in dispute or any better right to such possession than any private person; that the lands have never ceased to have the character of the submerged lands of a natural lake; and that defendant, at the time of the alleged trespass, had a right to enter thereon for the purpose of hunting. Judgment was accordingly entered dismissing the complaint with costs.

For the appellant there were briefs by *J. E. Malone* and *Joseph B. Doe,* and oral argument by *Mr. Doe.*

For the respondent there was a brief by *Lamoreux & Husting,* and oral argument by *E. Merton.*

MARSHALL, J. The first question which naturally engages our attention in considering the assignments of error upon this appeal is, Did the court err in holding that ch. 454, P. & L. Laws of 1867, is unconstitutional? Appellant depends entirely upon the validity of that act to make out a paper title to that which respondent is charged with having violated. The trial court decided that the act is invalid because it violates sec. 18, art. IV, of the constitution, which provides:

"No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

To sustain that decision, much reliance is placed on *Durkee v. Janesville,* 26 Wis. 697, where it was held that a local act

violates the constitutional limitation mentioned unless its title refers to the locality to which the act applies. The infirmity in that position is in the fact that the act in question is not a local, but is a private act. There have been so many decisions on the subject of the scope of the constitutional provision in question, that no new light can be easily, if at all, shed thereon. Some rules have been deduced from the various decisions, which furnish pretty safe guides to go by, and to those we will refer.

It has been repeatedly held that the title of an act should be liberally construed; that it should not be condemned as insufficient to constitutionally suggest those things found in the body of the act unless, giving thereto the largest scope which reason will permit, something is found therein which is neither within its literal meaning nor its spirit, nor germane thereto. Courts cannot sit in judgment upon the work of the legislature and decide one of its acts unconstitutional, merely because the title thereof is not as comprehensive as it might have been made. Within all reasonable boundaries, legislative discretion in that field cannot be rightfully interfered with. This court has said:

"Titles of acts should be liberally construed, and acts will be upheld if they substantially comply with this section, though their titles do not express their subjects as fully and unequivocally as possible." *Mills v. Charleton,* 29 Wis. 400.

Any number of provisions, all relating to a single object, including all the necessary or reasonable details thereof, may be covered by a title in such general terms as to fairly indicate such subject, the unity of the subject being taken as including within its scope all the details provided to effect the single legislative purpose. *Milwaukee Co. v. Isenring,* 109 Wis. 9, 22, 85 N. W. 131. The court of appeals of New York, speaking on the same subject, held that neither that court nor any other has said anything justifying the position that the various methods adopted in a bill to carry out its general de-

sign must be enacted by several bills in order to comply with the constitutional limitation; that courts cannot legislate, nor dictate legislation, nor have any concern with questions of mere propriety or wisdom. *Matter of Mayer,* 50 N. Y. 504, 508. Every subject which the court can see would or might facilitate the accomplishment of the primary purpose named in the title of an act is germane thereto, and may be considered as constitutionally suggested by the expression of such primary purpose. *People ex rel. Rochester v. Briggs,* 50 N. Y. 553, 564. 'The constitution does not require the title of a private or local bill to disclose or shadow forth the character of the proposed legislation, its full scope and purpose, and to make known the several interests which may be directly or indirectly affected by it so as to attract attention and give notice of all that is to be accomplished by the proposed act.' 'The constitution requires the subject of the act to be expressed in the title, but leaves the mode of expressing it wholly to the discretion of the legislature.' *People ex rel. Comm'rs v. Banks,* 67 N. Y. 568, 572. The supreme court of South Carolina is in line with the foregoing. It said, in *Connor v. G. P., W. & B. R. Co.* 23 S. C. 427, 435:

"When a question under this clause of the constitution is presented for adjudication, we are bound to take a liberal and enlarged view, and if practicable bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land."

'Everything which facilitates the subject or object of an act is covered by the expression of the subject.' The supreme court of the United States, in harmony with the decisions cited, holds that 'all the provisions of an act which are appropriate to carry out the expressed object thereof are sufficiently indicated by the expression of such object, and are in a constitutional sense included therein.' *Mahomet v. Quackenbush,* 117 U. S. 508, 511.

The foregoing sufficiently shows the extent to which courts have gone in resolving all reasonable doubts in favor of legislative power to the end that it may be in fact what the framers of the constitution intended it should be, independent and unimpeachable, within the broadest limits which reason can ascribe to constitutional limitations, having regard to the letter as well as the spirit thereof, the persons concerned in legislating being left, within such limitations, responsible for their conduct solely to the people. It is not improbable that the constitutional purpose in respect to the subject under discussion has in a measure failed because of the conservatism of that branch of our governmental system which is clothed with the duty of defining the limits set by the constitution for legislative power. If so, in that we have a demonstration that the rights of the people stand in no danger of judicial encroachments upon legislative and executive power. If the people desire to have the hands of such branches of the government tied more closely than the courts have been able to discover has been accomplished by the constitution as framed, the way is open to do so by further and more definite constitutional limitations. The court performs its full duty when it resolves all reasonable doubts against constitutional limitations upon legislative power, and unhesitatingly and vigorously enforces the restraints which are found to have been embodied by the people in their organic act of government. In that the court maintains such limitation in letter and spirit so far as judicial rules will permit, and it must be assumed that such rules were well understood when the constitution was framed and courts were created, charged with the office of construing it.

Probably as comprehensive a rule as can be found stated in the books, for testing the sufficiency of a title to a private or local legislative act, is the one deduced from the authorities by the New York court of appeals and approved in *Milwaukee Co. v. Isenring,* 109 Wis. 9: When one, reading a bill

with the full scope of the title thereof in mind, comes upon provisions which he could not reasonably have anticipated because of their being in no way suggested by the title in any reasonable view of it, they are not constitutionally covered thereby. But in applying that rule, this other rule, which has been universally adopted, must be kept in mind: The statement of a subject includes, by reasonable inference, all those things which will or may facilitate the accomplishment thereof. *People ex rel. Brockport v. Sutphin,* 166 N. Y. 163, 59, N. E. 770; *Hope v. Gainesville,* 72 Ga. 246. The extent to which the courts have gone in applying those principles is indicated by the following. An act entitled "An act to incorporate a railway company," specifying the name thereof, has been repeatedly held to include all provisions which may be reasonably considered to have been designed to aid in forming the corporation and accomplishing the object thereof, including a grant of power to a municipal corporation to take stock in the company, to issue municipal bonds in payment thereof, and all necessary provisions in regard to the details of taxation to raise money to pay the principal and interest on such bonds. *Hope v. Gainesville, supra; Mahomet v. Quackenbush,* 117 U. S. 508; *Schuyler Co. v. People ex rel. R. I. & A. R. Co.* 25 Ill. 181, 183. An act entitled "An act to incorporate the Firemen's Benevolent Association and for other purposes," was held to constitutionally suggest a provision requiring the agents of all foreign insurance companies doing business at the home of the corporation to pay two per cent. of all premiums received by them to the association treasury for its use. *Firemen's B. Asso. v. Lounsbury,* 21 Ill. 511. An act entitled "An act to amend the charter of Covington & Cincinnati Bridge Company," was held to suggest the subject of corporate power on the part of the bridge company to sell a part of its corporate stock to the city of Covington, and the subject of municipal power on the part of such city to take the stock, issue its corporate bonds in pay-

ment thereof, and levy and collect taxes from time to time to meet the principal of and interest on such bonds. *Phillips v. Covington & C. B. Co.* 2 Met. (Ky.), 219. An act entitled "An act to incorporate the Northwestern University" was held to include, as germane to the primary subject so expressed, a prohibition of the sale of spirituous liquors within four miles of the location of the college. *O'Leary v. Cook Co.* 28 Ill. 534. An act entitled "An act for the more uniform mode of doing township business," was said to include the subject of organizing new towns. *Clinton v. Draper,* 14 Ind. 295. An act entitled "An act to regulate proceedings in the county court" was said to suggest provisions regarding proceedings in the appellate court in the hearing and disposition of cases appealed from the county court. *Murphey v. Menard,* 11 Tex. 673.

Many more illustrations might be added to those we have given. Some mentioned seem to be rather extreme applications of the very liberal rule that everything found in the body of a legislative act should be deemed included in the title expressing a single subject, which may be reasonably considered as liable to facilitate the primary object of the enactment so expressed. It is not necessary for the purpose of this case to go so far as many of the courts have gone. We should hesitate long before doing so, as it would leave the constitutional limitation under consideration without valuable force. The spirit of the constitutional restraint can be made effective and still leave the legislature sufficiently free in the exercise of its discretionary power that it will not be embarrassed in any legitimate effort to perform its duties. It is reasonable to hold that the statement of a subject, by reasonable inference, states the details thereof, and that such details may be as broad as the purpose suggested by the subject in any reasonable view thereof, and are in a constitutional sense suggested thereby, so that no one need reasonably be astonished at coming upon any one of them in reading an act in

which they are included, the reader having in mind the full scope of the primary object of the enactment as expressed in its title. That rule carries out the constitutional requirement that the subject of an act shall be single and be stated in the title, leaving the legislature to exercise a broad discretionary power as to the mode of expressing it.

The subject of the act before us is the incorporation of a manufacturing company. That subject suggests at once a manufacturing business as the object of creating the corporation. It also implies, necessarily, a requirement for motive power and means of creating it, as by water, and, as necessary thereto, the maintenance of a dam; and to that end the right to acquire and maintain a dam. That suggests the necessity of acquiring the title to lands affected by the backwater of the dam, and power of the owner of such lands to sell the same to the corporation and to preserve existing conditions necessary to the exercise of such power. All of those matters are included in the act in question. The learned trial court supposed that the power granted to the corporation to maintain a dam, and to acquire, from the state, title to the lands covered by the backwater of the dam, and authority to the state to sell the land to the corporation and to retain the title thereto till that power could be exercised, were, in whole or in part, not germane to the mere creation of the corporation, hence that the act covered more than one subject and violated the constitution. Hence the act was condemned as invalid. Enough has been said to clearly show, in the light of the settled construction of the constitutional provision in question, that such decision cannot be sustained.

What has been said entirely relieves appellant's case from the supposed infirmity of there being no valid law creating the state's grantee of the lands in question and giving the state authority to convey the lands to such grantee, if, under any circumstances, it could so deal therewith. Ch. 454, P. & L. Laws of 1867, creating the Mechanics' Union Manufactur-

ing Company is a constitutional enactment. It gave to the appropriate executive and administrative officers of the state authority to convey to such corporation whatever proprietary title the state had to the lands referred to therein. We do not deem it necessary to consider the history of the passage of the act through the legislature. The wisdom of the measure and those things in respect thereto indicating that the legislature did not properly guard the interests of the state, which, by the industry of counsel, were brought to the attention of the trial court, do not concern the merits of the case, since they involve no constitutional question.

The next question to be considerd is, What was the nature of the state's title to the lands covered by the waters of Horicon lake, so called, at the time of the attempted conveyance thereof pursuant to the act of 1867? The learned trial court supposed it was the same as that to any land covered by the waters of a natural navigable lake, and that the numerous decisions of this court to the effect that the state has no proprietary right in such lands, no right which it can sell as state property, rule the case. True, the navigable waters of the state and the lands upon which they rest, as the same existed when the state was admitted into the Union, speaking only of natural bodies of water, became, at the instant of such admission, vested in the state for those public purposes incident to navigable waters at common law, and the state is powerless to change its relation thereto so far as the preservation of such relation is necessary to the trust, and it has not been changed at all as regards the beds of navigable lakes. *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534, 67 N. W. 918; *Willow River Club v. Wade,* 100 Wis. 86, 103, 76 N. W. 273; *Illinois S. Co. v. Bilot,* 109 Wis. 418, 426, 84 N. W. 855, 85 N. W. 402. True, also, if an artificial lake is created, or artificial level of a natural lake is caused by the erection of a dam, and such condition is allowed to exist ad-

versely for the full statutory period necessary to change the ownership of the land affected thereby, the former owner thereof cannot thereafter object to a continuance of such condition. By operation of the statute of limitations the artificial condition is thus stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition. No one can enforce its discontinuance. *Smith v. Youmans,* 96 Wis. 103, 70 N. W. 1115; *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185; *Pewaukee v. Savoy,* 103 Wis. 271, 276, 79 N. W. 436. But we are unable to see how those principles can be applied to the facts of this case. Counsel suggest, as the turning point in that regard, the following:

"Were the premises in question submerged lands in the year 1867, at the date of the alleged patent to the Mechanics' Union Manufacturing Company, and had they been such submerged lands for upwards of twenty years within the meaning of the decisions of this court, so that the title to the same became vested in the state in trust?"

In presenting that proposition for consideration counsel seem to assume that if the lands, for a period of twenty years prior to the making of the patent in 1867, were artificially submerged, the waters covering the same being navigable during such period, it must be answered in their favor, entirely overlooking the fact that the submerged condition must have existed under such circumstances as to change the title thereto from a proprietary to a mere trust character by the operation of the statute of limitations before it was interrupted, else no lake was created by prescription; that the mere fact of the existence of the artificial lake for twenty years does not solve the controversy. It stands admitted that the terri-

tory in question was covered by the United States land surveys long prior to the creation of the lake by the building of the dam across Rock river. The government plats (which we may properly refer to even though not in evidence) show such to be the fact. While the dam was built and the lands were covered by water in 1846, the title remained in the United States till the passage of the swamp land act of 1850, and was of course not affected by any statute of limitations. The statute began to operate against the state at the earliest date it acquired its title. Twenty years did not elapse thereafter till the patent was made conveying such title under the act of 1867 and the restoration of the lands to their former condition was accomplished by the destruction of the dam. The conclusion is irresistible, under those circumstances, that the lake created by the dam did not, prior to its discontinuance, become a natural lake by prescription. In 1850 the land was part of the surveyed public domain of the United States, unaffected by the artificial condition created by the dam previously built. If the lands were swamp lands, the title thereto, by the swamp land act, passed to the state as state property. While the decision of the land department of the general government as to whether lands were or were not covered by navigable waters at any particular time does not foreclose that question, as to whether lands were uplands or swamp lands within the meaning of the swamp land act at the time it took effect, the decision of such department is conclusive in all courts and as to all parties except a claimant by paramount title. *Quinby v. Conlan,* 104 U. S. 420. The United States land department regularly approved the lands in question as swamp lands within the meaning of the act of 1850, and the title of the state thereby became perfect as of the date such act took effect. That title was just as perfect when the patent was made under the state act of 1867, to the corporation under which plaintiff claims, as it was on the day it became vested in the state. The statute of limitations had

not then run against the state. It was interrupted before the title to the land became affected thereby. Therefore, the corporation, grantee of the state, obtained a perfect title to the lands described in its patent.

Counsel for respondent call attention to the ruling of the land department that the conditions existing when the swamp land act took effect must be looked to to determine whether the title to the land in question passed to the state thereunder, and contend, as we understand them, that the same rule should govern in determining whether the state, when it was admitted into the Union, took the title to the land as territory under navigable waters. It is sufficient to say on that subject that the rule to which counsel refer, citing an opinion by the commissioner of the general land office (*In re State of California,* 14 Land Dec. Dep. Int. 255), applies only to natural bodies of water, not to artificial lakes created by trespassing upon the public domain. The lands in question, as stated, were part of the public domain of the United States when they were surveyed by its authority. The artificial condition thereafter adversely created was properly treated by the general land department as ineffectual to change that condition, turning the land into the subject of a trust for a state to be formed. After the passage of the swamp land act it devolved upon the general land department to decide what part of the public domain was affected thereby, transferring the title thereto to the states. The territory in question was in due form approved as being so affected, and respondent is in no position to impeach that decision.

What has been said removes all the substantial support for the judgment appealed from, upon which the trial court rested it. There is a finding that appellant was never in the exclusive possession of the land. Inasmuch as its right does not rest on evidence of mere possession, but is based on a good

paper title to the exclusive use of the land for all purposes except cutting grass and pasturing stock, a violation thereof by respondent was unquestionably actionable. *Stephenson v. Wilson,* 37 Wis. 482.

Respondent's counsel insist that appellant, at best, was a mere licensee, hence could not maintain this action. In the first place appellant's right was not that of a mere licensee. It possessed a grant for a term of years, created by a written conveyance, of the exclusive right to the premises for some purposes, as before indicated. That created the relation of landlord and tenant between appellant and the holder of the legal title. 1 Wood, Landlord & T. (2d ed.), § 223. In the second place, it makes no difference what the exact nature of appellant's interest in the premises was, since the evidence is conclusive that it was wrongfully violated by respondent. From such violation a cause of action accrued to appellant to recover such damages as were proximately caused thereby. In contemplation of law, every violation by one person of a legal right of another, impairing to any extent, however slight, the enjoyment of that right, is an actionable wrong. Sutherland, Dam. § 9. The constitution guarantees a remedy in all such cases. Sec. 9, art. I. The amount of the damages suffered or recoverable, whether substantial or merely nominal, is no test of the right to a judicial remedy to redress a wrong. Counsel for respondent seem to think that no recovery can be had in this case unless appellant makes out a case satisfying all the essentials of a common-law action of *quare clausum fregit.* While it seems that such essentials were satisfied by the evidence in this case, that was not necessary. It was sufficient to show that respondent committed a hostile intrusion upon appellant's legal right to the premises in question. *Williams v. Esling,* 4 Pa. St. 486. It was very early held that a mere wrongful intrusion by one person upon a legal right of another, regardless of the amount of the

resulting damages, in contemplation of law is both an injury and a damage and is a subject for legal redress. *Weller v. Baker,* 2 Wils. 422; *Hobson v. Todd,* 4 Term, 71.

It is suggested that the court ought to hold that a person may go upon the land of another to hunt or fish without permission of the latter, and without incurring any legal liability for so doing, so long as such person does not cause any substantial damage to such other's property rights. What principle of law such a doctrine could be grounded upon we are unable even to suspect. Every person has a constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person. The mere fact that fish and game, in their natural condition, belong to the state for the enjoyment of the whole people, and that the state may regulate the manner of such enjoyment by compelling those who desire to participate therein to take out licenses, does not militate in the slightest degree against the property rights of others. No person has a right to go upon the land of another against the latter's will, or to so intrude upon the right of such other to the exclusive use of lands for any purpose, merely because he possesses a state license to hunt. Such a license does not affect the relations of the licensee with such other in the slightest degree. A violation of the latter's rights by such person, which would be an actionable wrong if he were not armed with a state license to hunt, would be such a wrong if he were so armed. It is a mistaken notion that such a license gives the holder thereof any right whatever to trespass upon the property of others.

The evidence in this case does not show that appellant suffered any substantial damage by the wrongful conduct of respondent. Appellant did not own the grass that was tramped down. The damage caused by the wrongful conduct was merely nominal. Appellant should have been allowed upon

the evidence to take judgment for nominal damages and costs.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in favor of the plaintiff in accordance with this opinion.

PORTER, Appellant, vs. COOK and wife, Respondents.

March 11—April 1, 1902.

Contracts: Disputed construction: Accepted offer of compliance with contract: Protest: Duress: Election between remedies.

1. Where the rights of the parties to a contract are in dispute, and one party makes an offer of compliance therewith in accordance with his construction of the contract, only upon condition that it settle the dispute, both parties having full knowledge and understanding as to how far it varies the rights asserted by the party to whom the offer is made, the acceptance or rejection of the offer is a matter of new contract, and the adoption of either course can be avoided for duress or coercion only when it is such as to override the will of the consenting party. *Ketchum v. Wells*, 19 Wis. 25, distinguished.
2. In such case the fact that the party must decide between serious inconvenience, embarrassment, or loss as the result of electing either course, is not enough to avoid the effect of the course chosen.
3. P.'s grantor, having agreed to sell land to C., afterwards insisted that, under the contract therefor, he was only required to give a quitclaim deed, while C. insisted he was entitled to a warranty deed, or an abstract showing clear title. Such controversy being submitted to arbitration, the arbitrator ordered the grantor, on payment of the balance due, to execute a deed covenanting against his own acts. He, however, executed a mere quitclaim deed, leaving it with the arbitrator for delivery when the purchase price was paid, and left the state. He had previously sold part of the land contracted to be conveyed, and part was encumbered by tax liens. C., having meanwhile contracted to convey the whole tract at an advance, being embarrassed by the delay, and with full knowledge of the defects and

variances in the deed, took the deed from the depositary, and paid him the consideration awarded by the arbitrator; protesting that he did not accept the deed as a compliance with the contract. *Held*, that C., by taking the deed, accepted full satisfaction of the contract, and had no right of action, except upon the deed itself, and, such deed being without warranty, he had no right of action thereon.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Modified and affirmed.*

This was an action to foreclose a mortgage obtained by the plaintiff by assignment after due from L. C. Porter. The adjudication of the amount due on the mortgage is not attacked on this appeal. The defendant counterclaimed, amongst other things, for damages upon breach of a written contract made by L. C. Porter, December 29, 1888, as follows:

"Received of Jules Parmentier and *Wm. Cook* . . . thirteen hundred dollars to apply on F. B. Gardner's lands sold L. C. Porter, and deeded him November 1st, 1886, and recorded October 12, 1887. Sold said Parmentier and *Cook* at one dollar an acre."

Almost immediately after the making of this agreement, disputes arose as to its execution; Porter insisting that he was required thereby to give only a quitclaim, and the defendant insisting on a warranty deed, or abstract showing clear title to all of the property specified in the deed to Porter. This controversy continued, each party insisting on his position. In August, 1889, a formal tender was made by defendant, with a demand for compliance according to his construction of the contract, namely, either a warranty deed covering all of said lands, or a deed without warranty, accompanied by an abstract showing clear title; and Porter reiterated his willingness to give a quitclaim deed which should cover all of the lands specified in the deed to him, although he had sold some, and although of some he confessedly had

no title; also insisting that he was to be paid $1 an acre for all such lands, independently of whether he had any or an imperfect title. In this situation the parties entered into what is called an agreement for arbitration by one George Beyer, on November 7, 1889. They presented to him their various contentions, and he made an award covering this and various other matters. The portion relating to this agreement is substantially as follows:

"All the lands covered by above receipt to which L. C. Porter has title I order deeded to *Wm. Cook,* by deed covenanting against his own acts, upon payment of the balance due, with interest at seven per cent. from date of sale up to the time final payment is made."

Thereupon Porter executed a deed substantially the same as that which he had on previous occasions offered, to wit, a mere quitclaim deed, covering all of the lands received by him from the Gardner estate under the deed specified in the receipt, and deposited it with Beyer as custodian, to be delivered up on payment of $1 an acre for all the land named therein and interest in accordance with the award. That deed included certain lands which had been conveyed to Porter from the Gardner estate, but which in the interval he had sold, so that he had no title. It contained eighty acres of the same land as to which Porter had no title whatever, and it contained 120 acres the title to which was obscured by tax liens antedating the conveyance to Porter to a considerable amount. Meanwhile Parmentier had assigned to *Cook* all his rights under the agreement of sale above recited. After the delivery of that deed, Porter went to the Pacific coast, leaving it on deposit. Meanwhile *Cook* had contracted for sale of these lands at an advanced price to one Mariner, and was seriously embarrassed by any delay. He had full knowledge of all defects or variances in said deed now complained of. With that knowledge the defendant took said deed from the depositary, and paid to him the balance of the considera-

tion therefor, in accordance with said award. Before taking it, he, or rather his attorney, pointed out to the depositary the defects complained of, and declared that the deed did not comply with the award. The attorney then went and endeavored to find Porter, without success; and just before the bank closed he returned to Beyer's office, "and told him that we would have to take the deed, but that we did not accept it as a compliance with the contract,"—pointing out his objections. He explained the reasons why they had to take it and would take it for what it was worth. "Beyer's reply was, urging us to take it, because he was disgusted with the whole transaction, and did not want anything more to do with it." The defendant shortly afterwards, apparently in pursuance of this conversation, procured to be paid the exact amount called for by the arbitration, and took the deed. The court held the defendant entitled to recover as damages several items of expense and loss resulting from Porter's continued refusal to comply with the contract of December 29, 1888, and from the insufficiency of the said deed to satisfy its terms, and set off such sums against the amount found due upon the mortgage. From this portion of the judgment the plaintiff appeals.

For the appellant there were briefs by *Greene, Fairchild, North & Parker,* and oral argument by *B. L. Parker.*

Arthur C. Neville, for the respondents.

Dodge, J. By reason of the view we have taken as to the effect of the delivery by Porter of a deed, and the acceptance thereof by the defendant, most of the questions discussed by counsel on this appeal are rendered immaterial. We are unable to avoid the conviction that that transaction must be deemed a final and conclusive settlement and adjustment of all the disputes arising under the contract of sale. There is not the slightest doubt that the paper was executed and left in the custody of the arbitrator, Beyer, as the

only thing which Porter was willing to do as a compliance with that contract or with the award. There is no particle of evidence that Beyer was anything but a custodian to hold that deed until the sum of money specified by his award was paid, and then to deliver it as full discharge of Porter's obligation under the former contract, according to his contention. This being the situation, defendant accepted that deed and paid his money, with the circumstances of protest more fully set forth in the statement of facts herewith. Defendant had no right to that deed except upon the terms assented to by Porter. His right, if Porter refused to carry out the agreement which they had made, was to bring action against him, either for specific performance or for damages resulting from the breach. He had no other alternative to the acceptance of the deed on the terms which Porter had imposed. *Perin v. Cathcart* (Iowa), 89 N. W. 12, 13; *Keck v. Hotel Owners' M. F. Ins. Co.* 89 Iowa, 200, 56 N. W. 438; *Woodford v. Marshall,* 72 Wis. 129, 133, 39 N. W. 376. His act in accepting it is unambiguous, and its legal effect cannot be averted by protesting that he will not be bound thereby. *Rutledge v. Price Co.* 66 Wis. 35, 27 N. W. 819. Of course, Porter might have consented to delivery of the deed upon the terms contended for by defendant; and if, after a protest to himself such as *Cook's* attorney made to Beyer, Porter had still delivered the deed, there might well have been a question of fact whether such act did not evince an assent to its delivery, not in full settlement but subject to adjustment of the still disputed rights. But no one except Porter, or an agent authorized by him, could make such assent. This rule rests on the most elementary principles of contract law, namely, that a proposition must be accepted exactly as it is made, or not at all, unless the offerer assents to modification. One to whom an offer is made cannot take to himself the benefits thereof without becoming bound to all the terms upon which it is made. No protest that he will not be bound can avail

him, except as it may, with surrounding acts and circumstances, serve as evidence that the other assented to some modification. To have such effect the protest must, therefore, be made to one having authority to modify; otherwise, of course, his conduct could be of no significance. When and if *Cook* declared that he would take the deed only as conveyance as far as it went, and would reserve his rights upon the original contract, Porter had the right to respond that he would not deliver it at all. Of this right he has been deprived, and in it he cannot be reinstated after defendant has conveyed away the lands to others, so that we need not discuss any right to rescind by the latter upon re-establishing the *status quo.* Indeed, no effort to that end has been made; nor, probably, could it now be done, in the light of the well-established rules of law most recently considered in *Bostwick v. Mut. L. Ins. Co.* 89 N. W. 538.[1] The situation differs radically from that presented in certain cases cited by respondent,—as, for example, in *Ketchum v. Wells,* 19 Wis. 25, where a purchaser, having ignorantly accepted at a distance, and removed to his factory, certain defective stave bolts, was held not to waive his right to damages for the defects by using them after discovery, when serious damage would have resulted from stoppage of his mill by refusal to use them; and, for further example, where one pays unlawful demand for money to release his goods or person. *Scholey v. Mumford,* 60 N. Y. 498. Here, the rights of the parties being in dispute, plaintiff offered the conveyance only on condition that it settle that dispute, with full knowledge and understanding by both parties as to how far it varied from the rights asserted by *Cook.* Its acceptance or rejection on those terms was matter of new contract, and defendant's adoption of the one course or the other can be avoided for

[1]A rehearing was granted in this case June 19, 1902, and it has not yet been finally determined or reported.—REP.

duress or coercion only when it is such as to override the will of the consenting party. The fact that he must decide between serious inconvenience, embarrassment, or loss as the result of electing either course is not enough. *City Nat. Bank v. Kusworm,* 91 Wis. 166, 64 N. W. 843; *Wolff v. Bluhm,* 95 Wis. 257, 70 N. W. 73; *Rochester M. T. Works v. Weiss,* 108 Wis. 545, 84 N. W. 866. The conclusion is irresistible that *Cook,* by taking Porter's deed, has accepted full satisfaction of the contract between them, and has no rights of action, except upon the deed itself. That being without warranty, and all defects in title to lands therein described having been fully known to *Cook* when he accepted it, he has no right of action thereon. The allowance of anything upon the counterclaim was erroneous, and must be eliminated from the judgment.

By the Court.—The judgment is modified as of its date by substituting the sum of $1,468.34 in place of the sum of $340.32 as the amount due upon the mortgage above all payments and setoffs, and to be paid in redemption or realized upon sale; and, as so modified, the judgment is affirmed. Appellant to recover costs in this court.

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ASHLAND LUMBER COMPANY, Appellant, vs. DETROIT SALT COMPANY and others, Respondents.

SAME, Respondent, vs. SAME, Appellants.

March 12—April 1, 1902.

Contracts: Construction: Breach: Instructions to jury: Evidence: Statutes: Foreign corporations: Conditions on which may transact business in Wisconsin: Validity: Constitutional law: Partnership.

1. A lumber company contracted with a partnership, engaged in the cooperage business, to furnish "slabs, edgings, and trimmings as they came from its mills," for which the lumber com-

pany was to be paid sixty cents per 1,000 pieces of headings manufactured therefrom. The partnership guaranteed that the lumber company should receive $25 for each 200,000 feet of lumber manufactured. *Held*, that there was no agreement or guaranty, express or implied, that the lumber furnished should be of dimensions and quality sufficient to enable the partnership to manufacture any specified number of pieces of headings from each and every 200,000 feet of lumber, and that instructions to the effect that there was such agreement were erroneous.

2. In such case, although inconsistent and out of harmony with said portions of the charge which were erroneous, it is not error to charge the jury that the lumber company was "bound to furnish such material, of the same or similar character, dimensions, and quantities, in the ordinary course of business, as they had been and were manufacturing at the date of this written contract," and, further, that the partnership had a right, under the contract, to assume that the plaintiff would not materially change its manner of slabbing its logs and trimming its lumber, although there was no express stipulation to that effect.

3. Under such contract, plaintiff would be entitled to recover according to the terms of the guaranty, until failure to so furnish, or until there was a change in the manner of slabbing or trimming, and thereafter for what the material received was reasonably worth.

4. In such case it is not error to allow the partnership to show an estimate, made prior to said contract, of the number of pieces of headings which could be realized from the kind of slabs, edgings, and trimmings then coming from the lumber company's mill, and that the contract was made with reference to such conditions.

5. Sec. 1770*b*, Stats. 1898, as amended by ch. 351, Laws of 1899, provides conditions on which foreign corporations may do business within Wisconsin; imposes penalties for failure to comply therewith; and declares that contracts made by such corporations, affecting its personal liability, or relating to property within this state, before it complies with the statute, "shall be wholly void on its behalf . . . but shall be enforceable against it." *Held*, that the words "wholly void," in said section, mean void absolutely, and not merely voidable at the option of the other party.

6. Such statute involves no question of foreign or interstate commerce, and is valid, however harsh its provisions may seem to be.

7. Where a contract is made by a partnership consisting of M. and two foreign corporations, which had failed to comply with the requirements of sec. 1770*b*, Stats. 1898, as amended, the contract being void as to the corporate members of the partnership, M., as an individual, acquires no rights thereunder.

APPEALS from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

It appears from the record, and is undisputed, that during the times mentioned the plaintiff was a corporation created and organized under the laws of Wisconsin, having a sawmill and place of business at Ashland; that during the same times the defendant *Detroit Salt Company* was a corporation created and organized under the laws of Michigan, and having its principal office at Detroit, in that state, and the defendant *Thompson Bros.* was also a corporation created and organized under the laws of Michigan, having its principal office at St. Clair, in that state; that during the times mentioned the two Michigan corporations and the defendant *A. Miller, Jr.*, constituted a copartnership doing business as manufacturers of heading and staves, under the firm name of Ashland Cooperage Company, at Ashland; that May 10, 1899, the plaintiff entered into a written contract with the Ashland Cooperage Company, wherein and whereby the plaintiff agreed to furnish slabs, edgings, and trimmings as they came from the plaintiff's mill, and the Ashland Cooperage Company agreed to take the same from the elevators, and to manufacture the same into heading, paying the plaintiff sixty cents per 1,000 pieces for all manufactured, guarantying that the number of pieces manufactured would net the plaintiff $25 for each 200,000 feet of lumber manufactured—the size of the pieces to be six and one-half inches by five eighths inches by twenty inches; the plaintiff to furnish piling room for drying purposes, dock room for shipping, and the necessary power in the mill for manufacturing. The Ashland Cooperage Company were not, however, to interfere with any machinery then in

operation in said mill. The Ashland Cooperage Company were to furnish their own machinery, and make all connections necessary for the manufacture of said stock, and to properly dispose of all refuse that the defendants might make. Payment to be made by the Ashland Cooperage Company on the 1st day of each month for all stock manufactured the preceding month. Such contract was to be in force during the sawing seasons of 1899, 1900, and 1901.

September 28, 1899, the plaintiff commenced this action to recover $1,395, as the balance then due the plaintiff from the defendants under such contract, with interest from that date. In addition to alleging the formal facts mentioned, and the substance of such contract, the complaint alleged, in effect, that from June 23, 1899, to July 31, 1899, there was manufactured at the plaintiff's mill 5,120,000 feet of lumber, and in August, 1899, there was manufactured at the plaintiff's mill 4,080,000 feet of lumber, and from September 1, 1899, to September 26, 1899, there was manufactured at the plaintiff's mill 3,280,000 feet of lumber, making in all 12,480,000 feet of lumber; that there became due and payable from the defendants to the plaintiff therefor, according to the terms of such contract, at the rate of $25 for each 200,000 feet of lumber manufactured, the sum of $1,560, upon which the defendants paid to the plaintiff the sum of $165 prior to July 31, 1899, and that there remained due and payable from the defendants to the plaintiff under the terms of the contract, before the commencement of this action, the sum of $1,395, no part of which had been paid; that the defendants had broken the terms of the contract, and refused to perform the same on their part, by neglecting and refusing to pay the sums becoming due as aforesaid under the contract on the 1st of each month for the stock manufactured the preceding month, and that the plaintiff had fully performed the contract and all the conditions and terms thereof on its part to be performed.

The defendants answered jointly, and expressly admitted

the incorporation of the plaintiff and two of the defendants, and the partnership of the three defendants, as alleged in the complaint, and the payment to the plaintiff by the defendants of $165 prior to August 10, 1899, but expressly denied any knowledge or information sufficient to form a belief as to whether the quantity of lumber manufactured at the plaintiff's mill was as alleged in such complaint during all or any or either of the periods therein mentioned, and, except as specifically admitted, denied each and every allegation of the complaint. The defendants further answered, and for a second and separate defense, and as a counterclaim, alleged, in effect, the incorporation and organization of the plaintiff and two of the defendants, and the making of the contract, as mentioned; that the plaintiff thereby agreed and became bound, in consideration of the promises of the defendants therein contained, to furnish to the defendants, at its sawmill, slabs, edgings, and trimmings of such kind and quantity as to yield 41,667 pieces of heading for each and every 200,000 feet of said lumber during the sawing seasons of 1899, 1900, and 1901, and to furnish to the defendants, for the purpose of manufacturing such heading, sufficient and necessary power, so that the heading machinery of the defendants would be properly driven and could be properly operated, and to provide for and furnish to the defendants sufficient room for handling such material, and for storing such product on its dock preparatory to shipping; that immediately upon the execution of the contract the defendants shipped to Ashland, and set up in the plaintiff's sawmill, the requisite machinery for the carrying out of the contract on their part, and duly performed all the conditions of that contract on their part to be performed, and June 26, 1899, the defendants began operations under that contract; that the plaintiff did not at any time furnish to them sufficient or necessary power for the manufacturing of such heading, or for the driving and operating of the defendants' heading ma-

chinery; that, for want of power, they could not, prior to August 28, 1899, manufacture more than 11,000 pieces of heading per day of ten hours, and that they were during that period equipped with men and machinery and fully prepared to manufacture on an average of 19,000 pieces of heading per day of ten hours, and would have done so if the plaintiff had furnished them sufficient or necessary power to properly operate their heading machinery, as it agreed to do; that the plaintiff failed, neglected, and refused to furnish the defendants at any time after August 28, 1899, slabs, edgings, and trimmings, or either or any of said kinds of material, in such quantity or of such kind as to yield 41,667 pieces of heading, or a greater number than 12,500 pieces, for every 200,000 feet of lumber manufactured by the plaintiff after that date; that the plaintiff did not furnish to the defendants sufficient or necessary room for the handling of such material, or the storing of such product on its dock; that for the purpose of thwarting the performance of the contract on their part, and compelling them to throw up the same, the plaintiff from and after August 28, 1899, until the attachment of the defendants' heading machinery, wilfully sawed slabs at its sawmill in such manner and of such dimensions as to make them practically worthless for the purpose of heading, and so as to render it impossible to get from them more than thirty per cent. of the quantity of heading which the plaintiff by its contract was required to furnish to the defendants; that in pursuance of the plaintiff's purpose the plaintiff wilfully hampered and embarrassed the defendants in the prosecution of their work under the contract, by depriving them of the necessary room for the handling of the material and interfering with their employees, and September 28, 1899, caused to be issued out of the circuit court a writ of attachment, and caused the same to be levied on all the property of the defendants at the plaintiff's mill, including the heading manufactured by the defendants as above de-

scribed and the defendants' heading machinery, and caused the defendants' heading mill to be seized by the sheriff under such writ of attachment, and the defendants to be excluded from possession thereof; that by reason of the premises the defendants were disabled from further performance of the contract, and were compelled to abandon the same; that the contract was a valuable one for the defendants; and that by the plaintiff's breaches of that contract the defendants had been deprived of the profits which would have accrued to them by virtue thereof, to their damage in the sum of $35,000.

The plaintiff, replying to such counterclaim, alleged, in effect, that the *Detroit Salt Company* and *Thompson Bros.*, parties to such contract, were at the time of making the same, and ever since had been, respectively, corporations organized under and in pursuance of the laws of Michigan, with their principal offices and places of business in Michigan, as stated; that said corporations had never been organized under the laws of Wisconsin, and that neither of said corporations was created solely for religious or charitable purposes; that neither of said corporations had been a fraternal or beneficiary corporation, or a corporation furnishing life or casualty insurance upon the mutual or assessment plan, or upon any other plan, and that said corporations were not, nor were either of them, organized for any one or more of said purposes, and that neither of said corporations had at the time of making the said contract, or at any time prior thereto, or at any time prior to the commencement of this action, caused to be filed in the office of the secretary of state of Wisconsin a duly authenticated copy, or any copy, of their, or either of their, charters or articles of incorporation, and that said contract affected the personal liability of the defendant corporations, and related to property within this state; and that the defendant corporations transacted business in this state under said contract, and that because of the

failure of said corporations to file, as aforesaid, a duly authenticated copy of their articles of incorporation as aforesaid, said contract was and is wholly void and unenforceable in favor of said corporations, as against the plaintiff; and, except as thereinbefore admitted or explained, the plaintiff denied each and every allegation in said counterclaim contained.

At the close of the trial the jury returned two verdicts, to the effect that they found in favor of the defendants on their counterclaim, and assessed their damages at $2,750 (that is to say, $750 for the sawing season of 1899, $1,000 for the sawing season of 1900, and $1,000 for the sawing season of 1901); and upon the issues made by the complaint and the defensive portion of the answer, they found in favor of the defendants, and that the plaintiff had no cause of action against them. Judgment was entered thereon in favor of the defendants and against the plaintiff for $2,750 damages, and for $338.83 costs. The plaintiff appeals to this court from the whole judgment. The defendants appeal from that portion of the judgment wherein they recover of the plaintiff $2,750 damages.

R. Sleight, for the plaintiff.

For the defendants there was a brief by *Lamoreux & Shea*, attorneys, and *Joseph H. Clark*, of counsel, and oral argument by *Mr. Clark*. They contended, *inter alia*, that if under sec. 1170*b*, Stats. 1898, the contract is absolutely void and a nullity and incapable of ratification by either party, the statute is unconstitutional, but that if the word "void" is construed as "voidable" it can be sustained as a constitutional enactment. *Mut. Ben. L. Ins. Co. v. Winnie*, 20 Mont. 20. The words "void" and "voidable" are often used in statutes indiscriminately. If the word "void" concerns the public good it is generally considered to mean void; but if it prohibits, for the purpose of securing private rights of interested parties, it is considered to mean voidable only.

Anderson v. Roberts, 18 Johns. 515; *Somes v. Brewer,* 2 Pick. 184; *Crocker v. Bellangee,* 6 Wis. 668; *Bromley v. Goodrich,* 40 Wis. 139; *Pearson v. Chapin,* 44 Pa. St. 15; Bigelow, Estoppel (4th ed.), 656, 657; *Oregonian R. Co. v. O. R. & N. Co.* 10 Sawyer, 464; *Robinson v. Pebworth,* 71 Ala. 240. Contracts made by a corporation not having complied with such law are not void, but voidable. *Am. L. & T. Co. v. E. & W. R. Co.* 37 Fed. 242; *Sherwood v. Alvis,* 83 Ala. 115; *Schierman v. Beckett,* 88 Ind. 52; *Day v. Wilson,* 83 Ind. 463; Thompson, Corp. secs. 7952, 7959; *Crouse v. Holman,* 19 Ind. 35; *Wait v. Maxwell,* 5 Pick. 217; *Allis v. Billings,* 6 Met. 415; *Arnold v. Richmond I. Works,* 1 Gray, 434. Where a citizen of the state has made a contract with a foreign corporation which has not complied with the law, and received benefit therefrom, he is estopped from avoiding the contract on that ground. *Farmers' L. & T. Co. v. C. & N. P. R. Co.* 68 Fed. 412; *Gamble v. Caldwell,* 98 Ala. 577; *Washburn M. Co. v. Bartlett,* 3 N. Dak. 138; *Holmes Co. v. Barnard,* 15 Weekly N. Cases, 110; *Kilgore v. Smith,* 122 Pa. St. 48; *La France F. E. Co. v. Mt. Vernon,* 9 Wash. 142; *Rathbone, Sard & Co. v. Frost,* 9 Wash. 162; *Watts-Campbell Co. v. Yuengling,* 51 Hun, 302; *Newburg P. Co. v. Weare,* 27 Ohio St. 343; *White River I. Co. v. S. W. Imp. Asso.* 55 Ark. 625; *Eastern B. & L. Asso. v. Bedford,* 88 Fed. 7; *Barnes v. People ex rel. Moloney,* 168 Ill. 425.

CASSODAY, C. J. The plaintiff's cause of action is based upon the guaranty of the defendants contained in the contract, to the effect that the number of pieces of heading manufactured by the defendants, of the size therein mentioned, would, at sixty cents per 1,000 pieces, net the plaintiff $25 for each 200,000 feet of lumber manufactured by the plaintiff. To fulfill such guaranty, the plaintiff claims that the defendants were bound to pay for 41,667 pieces of heading for each and every 200,000 feet of lumber manufactured by

the plaintiff. But such heading was to be manufactured from "slabs, edgings, and trimmings," as they came from the plaintiff's mill. True, as claimed by counsel for the plaintiff, the contract nowhere required the plaintiff to furnish "slabs, edgings, and trimmings" of dimensions and quality sufficient to enable the defendants to manufacture 41,667 pieces of heading for each and every 200,000 feet of lumber manufactured by the plaintiff; nor do we think any such agreement or guaranty is implied in the contract. In so far as the charge of the court is to that effect, we think it was erroneous. The simple agreement is that the plaintiff shall furnish "slabs, edgings, and trimmings *as they came from*" its mill, and the defendants were to take the same from the elevators. Counsel for the plaintiff, in his brief, concedes that the plaintiff agreed to furnish "slabs, edgings, and trimmings as they came from the mill, *in the ordinary course of business,* for stock for the defendants to make heading out of." This is said by way of argument in construing the contract, and so we assume it relates to the time of making the contract.

In charging the jury in regard to the custom in Ashland "as to the methods and manner of slabbing logs," they were told to consider such evidence, "especially as to the manner in which the plaintiff was slabbing its logs immediately before and at the time the contract was made between the parties to this contract," and that the plaintiff was "bound to furnish such material, of the same or similar character, dimensions, and quantities, in the ordinary course of business, as they had been and were manufacturing at the date of this written contract, May 10, 1899." And the court further charged the jury that "the defendants had a right, under the contract, to assume that the plaintiff would not materially change its manner of slabbing its logs and trimming its lumber, although there is no express stipulation written in said contract that they should so continue." We find no

error in such portions of the charge, although inconsistent and out of harmony with other portions of the charge above referred to. If, after making the contract, the plaintiff substantially changed its manner of slabbing its logs and trimming its lumber, so as to materially lessen the dimensions and quantity of such "slabs, edgings, and trimmings," to the substantial damage of the defendants, then thereafter the defendants were relieved from carrying out their part of the contract by paying according to the terms of the guaranty, but would only be liable thereafter for what the material received by them was reasonably worth. Whether there was such change, and, if so, when, is a question of fact for the jury. The same is true if the plaintiff failed to furnish the defendants piling room for drying purposes, dock room for shipping, or the necessary power in the mill for manufacturing such heading, as agreed in the contract. But until such failure to so furnish, or such change in the manner of slabbing and trimming, we perceive no reason why the plaintiff cannot recover according to the terms of the guaranty, and thereafter for what the material received by the defendants was reasonably worth.

2. Such being the true construction of the contract, we perceive no error in allowing the defendant *Miller* to testify to the effect that, prior to the signing of the contract, he went to the plaintiff's mill, and observed its operation, and made calculations as to the number of pieces of heading which could be realized from the slabs, edgings, and trimmings then coming from the mill, and then and there estimated the same at 43,000 pieces of heading from each 200,000 feet of lumber cut at the mill, and that the contract was made with reference to such conditions.

3. It is contended that the defendants were improperly allowed to take anything by their counterclaim, by reason of the failure of such Michigan corporations to comply with the statutes of this state (sec. 1770*b*, Stats. 1898, as amended

by ch. 351, Laws of 1899). That section provides, among other things:

"No corporation . . . incorporated or organized otherwise than under the laws of this state . . . shall transact business or acquire, hold or dispose of property in this state until such . . . corporation shall have caused to be filed in the office of the secretary of state a duly authenticated copy of its charter . . . and all amendments thereto which may be made while it shall continue to do business therein. . . . Every contract made by or on behalf of any such . . . corporation . . . affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, *shall be wholly void* on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

No question is made but that a duly authenticated copy of the charter of each of such corporations should have been filed with the secretary of this state before it attempted to "transact business or acquire, hold or dispose of property in this state," and there is no claim that the case does not come within the provisions of the statute.

One contention on the part of the defendants is that the words "shall be wholly void," in the last clause of the statute quoted, should be construed to mean simply voidable at the option of the plaintiff, and not absolutely void and a nullity. After careful consideration, this court has recently held that "where the statute provides that the act shall be void, and fixes a penalty for the perpetration of the prohibited act, the word 'void' should be interpreted as meaning void absolutely, in accordance with the technical accuracy of the word." *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964, and cases there cited. The section in question is highly penal. "The failure to comply with any" of its "provisions" subjects the corporation, "or any agent, officer or person acting for it in this state, to a penalty of $500" for the first violation, and $1,000 for any subsequent violation. We must hold that the words, "shall be *wholly void* on its behalf and

on behalf of its assigns, but shall be enforceable against it and them," mean just what they say; and, if they are valid, they render the contract in question absolutely void and a nullity, in so far as it is sought to be enforced on behalf of the defendants by way of counterclaim in this action.

Is the section a valid law? In the leading case of *Paul v. Virginia,* 8 Wall. 168, 181, it was said by Mr. Justice FIELD, speaking for the whole court in regard to foreign corporations, that:

"Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens, as, in their judgment, will best promote the public interest. The whole matter rests in their discretion."

This language was expressly sanctioned by the same learned court in *Ducat v. Chicago,* 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts,* 10 Wall. 566; and *Philadelphia F. Asso. v. New York,* 119 U. S. 117, 7 Sup. Ct. 108. Among the many more recent cases following in the same line are *Ashley v. Ryan,* 153 U. S. 436, 14 Sup. Ct. 865; *Hooper v. California,* 155 U. S. 648, 15 Sup. Ct. 207; *New York State v. Roberts,* 171 U. S. 658, 19 Sup. Ct. 58; *Waters-Pierce Oil Co. v. Texas,* 177 U. S. 28, 20 Sup. Ct. 518. In this last case it was held that "it is well settled that a state has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it." This court has frequently sanctioned and followed the same rule. *State ex rel. Drake v. Doyle,* 40 Wis. 197, 198; *State v. United States M. A. Asso.* 67 Wis. 624, 31 N. W. 229; *Larson v. Aultman & T. Co.* 86 Wis. 284, 56 N. W. 915; *Wyman v. Kimberly-Clark Co.* 93 Wis. 559, 67 N. W. 932.

No question of foreign or interstate commerce is here involved. We must hold that the statute in question is valid, however harsh its provisions may seem to be. The contract having been made and the business transacted by the defendants as copartners, the defendant *Miller* cannot, as an individual, take anything by the alleged counterclaim in favor of the firm.

By the Court.—The judgment of the circuit court is wholly reversed on the plaintiff's appeal, and the cause is remanded for a new trial. The defendants take nothing by their appeal.

WILLIAMS, Respondent, vs. WILLIAMS, Administratrix, Appellant. 114 114 79 [1881]

March 12—April 1, 1902.

Estates of decedents: Claim for services rendered by a brother: Implied contracts: Presumptions.

1. As between brothers, between forty and fifty years of age, each married, each for years managing his own individual affairs, and neither being dependent upon the other, there is no presumption that services, rendered after the arrival of claimant's family, in superintending the erection of houses were gratuitous, although before the arrival of his family, and for the first six weeks of such services, claimant had been living with his brother as a guest.
2. The presumption that such services were not gratuitous not arising, a contract to pay their reasonable value is implied from the mere fact of the rendition of valuable services by one brother to another, with the knowledge of such other.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is a claim by *John C. Williams* against the estate of his deceased brother, Daniel A. Williams, who died July 10, 1895. The claim, as filed, was to recover for nine months'

services "in planning, superintending, and building houses" on certain lots in Ashland, at $125 per month, from May 1st, 1892, to February 2nd, 1893, $1,125; for three months' services upon the same premises from May 1st, 1893, to August 1st, 1893, at $65 per month, $195. The claim, as filed, also contained other miscellaneous items, which, however, were disallowed; and, as there is no appeal on the part of the plaintiff from the judgment, it is unnecessary to state the items here. The answer of the defendant contains a general denial, and also an allegation of payment, and a number of counterclaims for moneys advanced by the deceased to the plaintiff, aggregating over $4,000; also a counterclaim for rent of a dwelling house in Ashland from September 1, 1892, to December 1, 1895, amounting to $468. After a trial in the county court, the plaintiff's claim was allowed at $375.40, whereupon both parties appealed to the circuit court. The case involving the trial of a long account, it was referred, and after a long trial the referee made his report, in which he found that the plaintiff performed ten months' services for the deceased between May 1, 1892, and August 1, 1893, in planning, superintending, and building certain houses, and in other work about the premises, of the value of $75 per month, amounting to $750 in all, which sum the plaintiff was entitled to have allowed against the estate of the deceased. The referee further found that the plaintiff was indebted to the estate of the deceased in the sum of $410 for rent of a house occupied by the plaintiff and his family from October 1, 1892, to December 1, 1895, and that all other claims and charges made by the parties against each other had not been proven. Upon these findings of fact the referee concluded that the plaintiff was entitled to judgment against the estate of the deceased for the sum of $340, with interest from February 24, 1896, together with costs. There was a motion on the part of the plaintiff to confirm the referee's findings, and also a motion on the part of the defendant to

modify the findings and render judgment in favor of the defendant. The plaintiff's motion to confirm the findings was granted, and judgment rendered for the plaintiff in accordance with said findings, and the defendant appeals.

E. E. Brossard, for the appellant, cited as decisions in which parties have been held to come within the rule of gratuitous services although they lived in separate houses and were not members of one family: *James v. O'Driscoll,* 1 Am. Dec. 632; *Raynor v. Robinson,* 36 Barb. 131; *Robinson v. Raynor,* 28 N. Y. 505 (dissenting opinion); *Ross v. Ross,* 6 Hun, 182, 185; *Peak v. Grover's Ex'rs,* 14 Ky. Law Rep. 206. This rule has been applied to dealings between brothers and sisters. *Collyer v. Collyer,* 113 N. Y. 442; *Hall v. Finch,* 29 Wis. 278, 286; *Scully v. Scully's Ex'rs,* 28 Iowa, 548; *Keller v. Stuck,* 4 Redf. Sur. 294. The relationship, at the beginning, gave plaintiff's labor its character; and it is presumed to have retained that character until some word or act was said or done which changed it. *Harris v. Smith* (Mich.), 6 L. R. A. 702; *Hall v. Finch,* 29 Wis. 278.

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park,* and oral argument by *B. B. Park.*

WINSLOW, J. The appellant makes two contentions upon the facts, and one upon the law, of the case. Her contentions of fact are (1) that the compensation allowed the plaintiff by the referee and the court for his services was excessive; and (2) that the evidence shows that such services were fully paid for by the deceased, and that a number of the defendant's counterclaims should have been allowed. Her contention upon the law is that upon the evidence the court should have found that the plaintiff's services constituted no legal claim, because no express contract to pay for them was proven.

We shall spend no time with the questions of fact. The trial was long, and the evidence quite complicated, covering many transactions between the parties; and after examination thereof, we are unable to say that it does not support the findings of fact made by the referee and confirmed by the court.

The question of law demands more serious consideration. The parties were brothers. No express contract between them was shown, and the appellant claims that, under the circumstances in evidence, an express contract on the part of the deceased to pay his brother for his services must be shown, by direct or circumstantial evidence, in order to entitle the plaintiff to recover, under the rule laid down by this court in *Hall v. Finch,* 29 Wis. 278, and numerous subsequent cases. *Pellage v. Pellage,* 32 Wis. 136; *Tyler v. Burrington,* 39 Wis. 376; *Wells v. Perkins,* 43 Wis. 160; *Ellis v. Cary,* 74 Wis. 176, 42 N. W. 252; *Estate of Kessler,* 87 Wis. 660, 59 N. W. 129; *In re Schmidt's Estate,* 93 Wis. 120, 67 N. W. 37; *Pritchard v. Pritchard,* 69 Wis. 373, 34 N. W. 506; *Geary v. Geary,* 67 Wis. 249, 30 N. W. 601; *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439. The rule laid down in these cases is well summarized in the case of *In re Schmidt's Estate, supra,* as follows:

"Where near relations by blood or marriage reside together as one common family, and one of them renders services to another, and such other furnishes him board and lodging, or other necessaries or comforts, the presumption arises that neither party intended to receive or pay compensation for the services, on the one hand, or the board and lodging or other necessaries or comforts, on the other, and that they were intended as mutual acts of kindness, done or furnished gratuitously."

The respondent recognizes this rule as correct, but claims that it does not apply to the present case, and with this contention we are inclined to agree. In the present case the parties were brothers, it is true; but they were grown men, be-

tween forty and fifty years of age. Each was married, and each had for years managed his own individual affairs; there being no facts showing dependence of the one upon the other. When the plaintiff came to Ashland, in April, 1892, he came without his family, and lodged with his brother (the deceased), evidently as a guest, and stayed there for a number of weeks; the exact length of his stay being uncertain, under the evidence, but it does not seem to have exceeded six weeks. During this time he commenced superintending the erection of some houses which his brother (the deceased) was building upon lots owned by him in Ashland. The testimony is quite convincing that he put much labor into this enterprise, not only superintending the work, but drawing rough plans himself, buying and paying for the material out of funds furnished by his brother, doing rough carpenter work, painting woodwork and building walks personally, and in fact spending all his available time in the work from the time of its commencement, in May, 1892, up to August 1, 1893, with the exception of the months of February, March, and April of 1893. The evidence tends to show that he ceased to live at his brother's home in June, 1892, and went to live in one of his brother's houses, though still taking his meals with his brother, until his family came, somewhere about July 1, 1892, after which he took his meals at home, with his own family, and defrayed his own living expenses by the aid of a son who was at work for others. It may be admitted that, while the plaintiff was stopping at his brother's house and taking his meals there, he must be regarded as a guest, and that any incidental services which he might then render to his brother would be regarded simply as offices of kindness, for which no pay was expected, any more than pay would be expected for lodging and meals furnished him. As said in the case of *In re Schmidt's Estate, supra,* "The law would not imply a promise on the part of a guest

to pay for board and lodging," nor, on the other hand, would it imply a promise to pay for services rendered by him while receiving the hospitality accorded to him as a guest. *Moulin v. Columbet,* 22 Cal. 508; *Scully v. Scully's Ex'rs,* 28 Iowa, 548. But when he set up in his own housekeeping establishment, and ate at his own table, he certainly ceased to be a guest; nor do we think the mere fact that the deceased was his brother would be sufficient to raise the presumption that his labor was simply an expression of brotherly kindness. It must be admitted that the line is not always an easy one to draw. Where there is close relationship between the parties, and they live under the same roof, the rule is almost universal that services rendered by one to the other are presumed to be simply natural acts of kindness, and intended as a gratuity. Such are most of the recorded cases. There doubtless are cases where, though the parties do not live in the same household, still, from the closeness of the relationship, and the fact of dependence of the one upon the other, as of an aged party upon a son, or a feeble sister upon a brother, the same presumption may arise. *Raynor v. Robinson,* 36 Barb. 128; *Ross v. Ross,* 6 Hun, 182. We do not think it arises, however, under the circumstances of the present case, after the plaintiff's family came to Ashland and he commenced housekeeping with them. Under the testimony this appears to have been about the 1st of July, 1892; and the referee seems to have allowed compensation only from this time, for he has allowed but ten months' services between May 1, 1892, and August 1, 1893,—a period of fifteen months in all. The referee, therefore, must have omitted the months of May and June, 1892, as well as the months of February, March, and April, 1893, for which the plaintiff claimed no compensation, in order to arrive at his result. The presumption that the services were gratuitous not arising, the ordinary rule that, from the mere fact of the rendition of valuable

services by one to another, with the knowledge of such other, a contract to pay their reasonable value will be implied, must apply.

By the Court.—Judgment affirmed.

AMES, Respondent, vs. D. J. MURRAY MANUFACTURING COMPANY, Appellant.

March 12—April 1, 1902.

Corporations: Contract of employment: General agent: Authority: Evidence: Instructions to jury: Burden of proof: Custom.

1. A general agent of a corporation has authority to bind his principal in respect to all the usual means of carrying out the work under his charge.
2. In an action against a corporation for breach of a contract of employment, the evidence, among other things, tended to show that the corporation placed B. as foreman in charge of constructing a mill; that the plaintiff was employed to work for the corporation until the construction of its mill was completed. The contract was made with the foreman, who employed and discharged men and occupied the position of general foreman of the job. *Held*, that it was error to instruct the jury, in substance, that such contract was within the general scope of the foreman's authority, and that evidence that it was not the custom to hire men for definite periods of time in doing such work had no bearing on the question of the foreman's authority, but only on the question as to whether or not the plaintiff was employed as alleged.
3. The burden of proving that such agent had such authority is on the party relying thereon to make out his cause of action.
4. In such case proof of a custom is not to show what the agent did in the course of his agency, but what was within the scope of his authority to do.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action for damages for breach of contract of hiring for a

definite time. Plaintiff claimed that on October 20, 1898, defendant hired him to work till the succeeding spring at $2 per day, and that in breach thereof, without any just cause, he was discharged December 10, 1898, whereby he was deprived of the opportunity to labor and earn wages for the balance of the term for which he was hired, to his damage in the sum which he might have earned had his contract not been wrongfully broken.

The evidence tended to prove that defendant placed one Burrows in charge of the work of constructing a mill; that Burrows hired and discharged men, and, generally, occupied the position of general foreman of the job; that pretending to have authority from defendant, about November 8, 1898, he offered to give plaintiff employment at $2 per day till the mill job should be completed if the latter would agree to stay right through; that plaintiff accepted such offer and commenced work under the contract thus made; that December 14th he was paid for all work theretofore performed by him, and was discharged without cause; that the work of constructing the mill lasted at least ninety days after such discharge, and that during such time plaintiff was able to and did earn $58 and no more.

The evidence for defendant was to the effect that Burrows did not have authority to hire any person to work on the mill job for a definite time. There was no evidence of any custom to hire laborers for definite periods of time in doing such work. On the contrary, the undisputed evidence was that it was customary not to hire in that way on such work.

The court instructed the jury in effect as follows: Evidence of custom is only to be considered as bearing on the question of whether defendant is right in its claim that plaintiff was not employed for a definite time. If plaintiff was employed by defendant, or defendant's authorized agent, for a definite time, as plaintiff claims, he is entitled to recover, regardless of whether the custom was to hire in some

other way. Evidence of custom was allowed and is to be considered only as bearing on the understanding of the parties. If Burrows was held out by defendant as its agent, apparently with authority to make such contracts as plaintiff claims were made with him, and plaintiff acted in good faith in making such contract with Burrows, defendant is bound thereby regardless of what his authority was in fact.

The jury rendered a verdict for plaintiff for $2 per day for the time they found he was not allowed to work on the mill, less the amount he earned working elsewhere, and judgment was entered in his favor therefor and for costs.

For the appellant there was a brief by *Mylrea & Bird,* and oral argument by *W. H. Mylrea.*

For the respondent there was a brief by *Sanborn & Sanborn,* and oral argument by *A. W. Sanborn.*

MARSHALL, J. There is abundant evidence to sustain what we must assume the jury decided, as to Burrows being the general agent of appellant in charge of constructing the mill. As such agent he had authority to bind his principal in respect to all the usual means of carrying out the work under his charge. To that extent he possessed the same authority as his principal. *Roche v. Pennington,* 90 Wis. 107, 62 N. W. 946. The learned circuit court, by the charge to the jury, decided that the making of such a contract as that testified to by respondent, a contract to work through the entire time of installing the mill, was within the general scope of a superintending agent's authority as a matter of law, and that evidence that the custom in doing such work was not to make such contracts had no bearing on the question of the agent's authority. That is clearly erroneous. It is by no means clear that, as a matter of law, the foreman in charge of constructing a mill possesses, by implication, authority to employ laborers upon the work, binding his principal to give them employment till the completion thereof. We are in-

clined to say that there is at least room for conflicting inferences in respect to the matter; that the burden of proving that such an agent has such authority is upon the party relying thereon to make out his cause of action; that in this case such burden was on the plaintiff. He should have produced some evidence, it seems, in regard to the matter, and if, on the case made by the whole evidence, the fact involved was left in reasonable doubt, that doubt should have been solved by the jury under proper instructions. Plaintiff did not produce any evidence on the subject at all, while there was considerable evidence on the part of defendant that the universal custom in doing mill work was not to engage employees for any definite time. In that situation the court should have taken the case from the jury by directing a verdict in favor of appellant. The learned court clearly misconceived the office of evidence, in a case like this, to prove what is customary in respect to the manner of conducting the work. Its office is not to show what the agent did in the course of his agency, but what was within the scope of his authority to do. This court has several times passed upon that question. *Pickert v. Marston,* 68 Wis. 467, 32 N. W. 550; *Larson v. Aultman & T. Co.* 86 Wis. 281, 56 N. W. 915; *Roche v. Pennington, supra.* For error of the court in disregarding that rule the judgment must be reversed.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

BROSSARD, Administrator, Appellant, vs. WILLIAMS, Respondent.

March 12—April 1, 1902.

Pleading: Executors and administrators: Right to purchase claim and maintain action thereon.

1. An allegation in a pleading that "the defendant refuses, and has ever refused, to account for or pay over" the indebtedness sued for, implies a previous demand, and is equivalent to an allegation of a demand and a refusal.
2. Where, in a complaint, it was alleged that a cause of action against defendant was sold and assigned to plaintiff as administrator of a decedent's estate, for a valuable consideration, it sufficiently alleges plaintiff's legal capacity to sue.
3. In such case, if plaintiff has a valid transfer of the claim as against his assignor, and defendant has no interest in the estate represented by plaintiff, the defendant is protected and has no interest to inquire further.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The plaintiff brings this action as administrator of the estate of D. A. Williams, deceased. The complaint shows the death of Williams intestate, and plaintiff's appointment and qualification as administrator. It then says that the Ashland News Company, a corporation, executed notes and a chattel mortgage to one John Thompson, for $1,500. These notes and mortgage were duly assigned to Ella V. Williams. On December 18, 1894, said corporation paid upon said notes and mortgage the sum of $503.32 to defendant, *John C. Williams,* for said Ella V. Williams. The defendant thereby became indebted to her for money had and received for her use, no part of which sum has been paid. The defendant refuses, and has ever refused, to account for or pay over the same, or any part thereof. On February 28, 1899, said Ella V. Williams, for a valuable consideration, sold and assigned said claim to the

plaintiff, who is now the lawful owner and holder of said indebtedness.

The defendant demurred to the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action, and that the plaintiff had not legal capacity to sue. The trial court first entered an order overruling the demurrer. Later, said order was vacated, and an order entered sustaining the demurrer, from which this appeal is taken by plaintiff.

For the appellant there was a brief by *Paul D. Durant,* attorney, and *E. E. Brossard,* of counsel, and oral argument by *Mr. Brossard.*

W. E. Cavanaugh, for the respondent.

BARDEEN, J. 1. The defendant insists the complaint is insufficient, because it fails to allege a demand upon defendant before the commencement of suit. It is alleged that "the defendant refuses, and has ever refused, to account for or pay over" the indebtedness sued for. Defendant's contention is completely answered by the case of *Divan v. Loomis,* 68 Wis. 150, 31 N. W. 760, in which it is said: "An allegation of refusal implies a previous demand, and is equivalent to an allegation of a demand and a refusal."

2. The second point urged by defendant is that the plaintiff has no legal capacity to sue, for the reason that he has no power or authority as administrator to purchase the claim upon which this action is based. The general proposition is admitted that an administrator will not be permitted to speculate with the funds of his decedent's estate. But that proposition is not here for consideration. The allegation is that the claim against defendant was sold and assigned to plaintiff for a valuable consideration. If the plaintiff had a valid transfer of the claim as against his assignor, the defendant had no interest to inquire further. *Chase v. Dodge,* 111 Wis. 70, 86 N. W. 548; *Sheridan v. New York,* 68 N. Y. 30. So

far as the pleading discloses, the defendant had no interest in the estate represented by plaintiff. A payment to plaintiff would be a complete shield against any further prosecution of the claim. If plaintiff was mismanaging the estate intrusted to his care, or speculating with its funds, he was responsible to the parties interested in the estate. The defendant had no interest in any controversy that might arise in this respect, so long as he was protected against any claim that could be made by plaintiff's assignor.

By the Court.—The order sustaining the demurrer is reversed, and the cause is remanded with directions to enter an order overruling the demurrer, and for further proceedings according to law.

STRAW, Appellant, vs. KROMER, Respondent.

March 12—April 1, 1902.

Supplementary proceedings: Undertaking for appearance of judgment debtor: Construction: Failure to appear: Principal and surety: Prejudicial error.

1. Sec. 3034, Stats. 1898, requires that the undertaking, given for the appearance of the judgment debtor in proceedings supplementary to execution, shall be conditioned to require him from time to time to attend before the judge, as he shall direct, and that during the pendency of the proceedings the judgment debtor will not dispose of any portion of his property not exempt from execution. *Held*, that an undertaking, given in such proceedings, conditioned "that the defendant shall appear before the county judge on [an hour of a certain day], to answer as a witness in supplementary proceedings therein pending, and abide any order or judgment made therein," differs radically from that required by said statute, and is but a common-law bond.
2. Such undertaking is to be construed, as against the surety, as any other instrument—reasonably, but not so as to extend it beyond the fair import of its words.

3. In such case, where it appeared that no order or judgment in the proceedings was made; that the judgment debtor appeared personally on the day mentioned in the undertaking, and by attorney on an adjourned day, but absconded before the day set by a further adjournment, no breach of the undertaking is shown, and the surety is released.
4. In such case, where there is no evidence to show that the surety consented to any adjournment, the plaintiff is not prejudiced by any error in submitting to the jury the question whether the defendant (the surety) was present when the adjournments were taken and consented thereto.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff, having a duly transcripted judgment against one Seth Pierce, upon which execution had been returned unsatisfied, upon affidavit showing apprehension that Pierce would leave the state, procured to be issued a warrant from the county judge of Ashland county to bring said Pierce before him to answer on oath concerning his property, and to abide and perform such further or any other order as might be made. Pierce, having been arrested, gave an undertaking, signed by this defendant as surety, to the effect "that the defendant shall appear before the county judge on the 9th day of July, 1900, at 2 o'clock p. m., to answer as a witness in supplementary proceedings therein pending, and abide any order or judgment made therein." Pierce did appear on the 9th, and by agreement the proceedings were "held open" until July 10, 1900, at 2 o'clock, for the purpose of enabling him to perfect his appeal and get bond. On the 10th his attorneys appeared for him, and by agreement the proceedings were held open again until July 11th, 2 o'clock. At that time he failed to appear, and absconded. There was evidence that the defendant, *Kromer,* was present at the time of the adjournment on the 9th, and made no objection thereto, though there is no proof of any express assent, and he asserts that he had no knowledge or understanding of the proceeding. There is no evidence that he was present at the adjournment taken on

July 10th, or had any knowledge thereof. The instructions to the jury confined the issues to two questions, namely, whether the defendant, *Kromer,* was present when the adjournments were taken, and consented to the same, and whether any demand was made upon the defendant before bringing suit. A verdict was found for the defendant, and judgment entered accordingly after a motion for a new trial, from which the plaintiff appeals.

J. J. Miles, for the appellant.

For the respondent the cause was submitted on the brief of *G. P. Rossman.*

DODGE, J. The undertaking upon which this action is predicated differs radically from that required by the statute (sec. 3034, Stats. 1898), the condition of which is required to be that the defendant "will from time to time attend before the judge, as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution." It is therefore to be deemed a common-law bond, and to be construed as any other instrument,—reasonably, but not so as to extend it beyond the fair import of its words, as against the surety. So construed, we are persuaded that no breach of the undertaking has been shown. It required only the attendance of Pierce on July 9th, when, confessedly, he did appear. It required, also, that he abide any order or judgment made in the proceeding, but it does not appear that any order or judgment has been made. By reason of the adjournment and intervening disappearance of Pierce, we presume, the rendition of any such became futile. This construction is apparently the same as that given by the court below, who, however, deemed it possible that liability might be continued if *Kromer* consented to the holding of the case open on the 9th until the 10th, and on the 10th until the 11th. He accordingly submitted this question to the jury, by an instruction of which some complaint is made by

the appellant. Upon careful examination of the evidence, we are wholly unable to discover any which tends toward proving a consent on the part of *Kromer* to any adjournment, even on the 9th, but especially on the 10th, day of July; so that, whatever instruction may have been given, there were no facts which could, even upon the theory adopted by the court, render the defendant liable; and plaintiff cannot have been prejudiced by any errors in submitting that question to the jury. Defendant was entitled to judgment on the undisputed evidence.

By the Court.—Judgment affirmed.

MILES, Administrator, Appellant, vs. STANKE and another, Respondents.

March 12—April 1, 1902.

Landlord and tenant: Covenants of lessee against negligent injury: Opinion evidence: Trial: Instructions to jury.

1. In an action to recover of a tenant for negligence, alleged to consist in leaving an awning hanging down in a storm, whereby it was blown against and broke a plate-glass window, the question of negligence is for the jury, and it is not error to exclude the opinion of a witness that it was dangerous to do so.
2. In such case it is not prejudicial error to submit to the jury the question of whether the window was broken through the negligence of the tenant, nor to instruct that the burden of proof on the question of negligence was on the tenant, and, if they found that the tenant was negligent and such negligence was the proximate cause of the breaking of the window, the plaintiff should recover, otherwise the tenant.
3. The mere failure to give an instruction for which there was no request is not error.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

J. J. Miles, appellant, *in persona.*

For the respondents there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.*

CASSODAY, C. J. It appears from the record, and is undisputed, that May 11, 1899, the plaintiff's intestate, Ervin Leihy, made a written lease of the building and lot therein described to the defendants under their firm name of Robert F. Stanke & Co., as expressed in the lease, "for the term of one year from June 1, 1899, or as soon thereafter as the building is fit for occupancy, for the annual rent of $720, to be paid in even and equal proportions on the 1st day of each and every month; the first payment to be made on the 1st day of June, 1899, or as soon as the building is occupied;" and the defendants therein also agreed "to keep the same in as good repair as the same are in at the commencement of said term (reasonable use and wear thereof and damage by fire or other unavoidable accidents not happening through the neglect of the lessee only excepted)." It is undisputed that June 30, 1899, the defendants gave their check to the plaintiff, who was then acting as the agent or attorney for Leihy in the transaction, for $60, on account of such rent, and stating therein, "Rent starting July 1, '99;" and the check was indorsed on the back by the plaintiff. August 1, 1899, the defendants gave to the plaintiff another check on account of such rent for $60, stating therein, "Rent ending August 31, '99." Such payments for rent were made by check at the beginning of each month until June 1, 1900, when the defendants gave a check to the order of Leihy for $60. That check was returned to the defendants with this indorsement:

"This check is returned for the reason your lease expires—terminates—June 24th, and I expect possession of the building at termination. E. LEIHY,
"per MILES, Agt."

This action was commenced in justice's court July 25,

1900, to recover $60 as the last instalment of rent due on the lease June 1, 1900, and $61.70 for negligently breaking a plate glass in the front of such building. The defendants answered to the effect that the building was not fit for occupancy until July 1, 1899; that the rent had all been paid on the lease as the same became due from month to month until June 1, 1900; that on that day the defendants gave Leihy their check for $60 in payment of the last instalment of rent, and that the same was returned with the indorsement mentioned; that such tender of that month's rent was brought into court, and kept good, and that the same had been paid and accepted by the plaintiff. As to the alleged cause of action for the broken glass, the defendants answered to the effect that they had kept the premises in as good repair as the same were at the commencement of the term, as stipulated in the lease, and otherwise denied each and every allegation contained in the amended complaint. The plaintiff recovered $60 damages in the justice's court, and on appeal to the circuit court the cause was retried, and at the close of such trial the court submitted two special questions to the jury; and the jury returned answers to the same, which, with the general verdict, are to the effect: (1) That it was finally agreed that the lease for a year of such premises should begin to run the 1st day of July, 1899; (2) that the said plate-glass window was not broken through the neglect of the defendants, or either of them; (3) "and, further, we find for the defendants and against the plaintiff, 'No cause of action herein.'" From the judgment entered thereon accordingly the plaintiff brings this appeal.

The lease was for one year. It was to commence "June 1, 1899, or as soon thereafter as the building" should be "fit for occupancy." Sixty dollars rent was to be paid in advance "on the 1st day of each and every month, the first payment to be made" June 1, 1899, or as soon as the building should be fit for occupancy. If the building was fit for occupancy June 24, 1899, as claimed by the plaintiff, then the first

month's rent was payable at that time. If it was not fit for occupancy until July 1, 1899, then, as claimed by the defendants, the first month's rent was not payable until that time; and the year for which the premises were so rented would not expire until July 1, 1900. Confessedly, the first month's rent was paid by check June 30, 1899, stating therein, "Rent starting July 1, '99;" and the second month's rent was paid by check August 1, 1899, stating therein, "Rent ending August 31, '99." The jury found that it was finally agreed between the parties that the lease for the year should begin to run July 1, 1899, and not June 24, 1899, as claimed by the plaintiff. Such finding was sufficiently supported by the evidence. For the purposes of this case it is settled, therefore, that the term covered by the lease did not expire until July 1, 1900. There is no ground for the contention that the question so submitted was immaterial. Nor do we find any error in the charge of the court submitting the question.

The plaintiff claimed $61.70 as cost of replacing a glass broken in the front of the building by being struck by the awning in a severe windstorm in the night. It will be observed that by the provisions of one of the clauses of the lease, quoted above, the defendants were expressly exempted from any damage to the premises "by fire or other unavoidable accidents not happening through the neglect of the" defendants. Error is assigned because a witness on the part of the plaintiff, after testifying that he knew whether an awning was dangerous to windows or plate glass when left hanging down in a storm, but that before the happening of the catastrophe in question he had no special knowledge on that subject more than any other person or any other merchant, was precluded from testifying whether it was dangerous to leave an awning hanging down in a storm, so far as plate glass under the awning was concerned. We perceive no error in such ruling. The question was clearly for the jury. The jury answered that the

plate-glass window was not broken through the neglect of the defendants, or either of them. There is sufficient evidence to sustain such finding. The court charged the jury to the effect that the burden of proof on that question was upon the defendants; that, if either of the defendants was negligent, and such negligence was the proximate cause of the breaking of the window, then they should answer the question in the affirmative, otherwise in the negative; that they should not answer the question in favor of the defendants unless they were satisfied by a fair preponderance of the evidence that their alleged negligence was not the proximate cause of breaking the glass; that, if they found that the accident was not the result of the alleged negligence of the defendants, or either of them, which was the proximate cause thereof, or that it was by the act of God, then they should answer the question in the negative. We find no reversible error in such submission of the question or the charge of the court thereon. The finding of the jury on that question is sustained by the evidence. The contention that it should have been decided by the court in favor of the plaintiff, as a matter of law, is without foundation.

It is said that "the court should have at least instructed the jury what constitutes proximate cause." It is enough to say that counsel for the plaintiff made no request that the court should so charge the jury. *Murphy v. Martin,* 58 Wis. 276, 16 N. W. 603; *Austin v. Moe,* 68 Wis. 464, 32 N. W. 760; *Seyring v. Eschweiler,* 85 Wis. 117, 55 N. W. 164. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

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CITY OF ASHLAND, Appellant, vs. WHITCOMB and another, Receivers, Respondents.

March 13—April 1, 1902.

Appeal and error: Questions reviewed: Supreme court: Record: Conclusiveness of recitations in orders: Appealable orders.

1. In the absence of an admission of the fact alleged to exist the supreme court can consider nothing but what appears on the face of the record.
2. On appeal from an order striking a cause from the calendar on the ground that it had been removed into a federal court, the order specifically recited that it was based on the *files and records*. The record was certified to be all the original files in the action, and there was no bill of exceptions. There was no paper in the record showing or tending to show that the federal court had assumed jurisdiction of the action. *Held:*

   (1) The record affirmatively excluded the possibility of any other fact having been before the court than the facts appearing in the *files and records*.

   (2) The mere recitation, at the close of the order, that the reason for granting the motion was, that the action had been removed to the federal court and that that court had assumed jurisdiction and retained said action, cannot be considered as proof of such fact, in the face of the direct statement that the order was based upon written records alone, which contain no proof thereof.
3. *It would seem* that had the fact that the federal court had assumed jurisdiction been recited as a fact proven on the hearing of the motion, such recitation would be conclusive.
4. An order striking a cause from the calendar, based upon the ground that no such action is pending in the court, is, in effect, a ruling that the court has no jurisdiction, and is appealable.

APPEAL from an order of the circuit court for Ashland county: GEO. W. BURNELL, Judge. *Reversed.*

This is an action in equity commenced July 26, 1897, to compel the removal of certain obstructions alleged to have been erected and maintained by defendants in Fourth Avenue West, a public street in the city of Ashland, and to restrain the defendants from interfering with or obstructing said

street in the future. The complaint, after alleging the fact that the plaintiff is a municipal corporation, and the further fact that the Wisconsin Central Railroad Company is a domestic railroad corporation, alleges that the defendants were appointed receivers of said railroad corporation by an order of the circuit court of the United States for the Eastern district of Wisconsin, September 27, 1893, and still are acting as such receivers; that a public street named "Fourth Avenue West" exists in said city which was prior to the year 1897 much used by the inhabitants, and had a sidewalk for foot passengers on the east side thereof; that on the 9th day of February, 1897, the defendants removed said sidewalk, and obstructed said street by a fence and barricade across its entire width, which they still maintain. Judgment was demanded that the defendants be required to remove said obstructions, replace the sidewalk, and that they be enjoined from further interference with the street. On the 14th of August, 1897, the defendants filed their petition for removal of the action to the United States circuit court for the *Eastern* district of Wisconsin. The petition alleges the appointment of the defendants as receivers by order made in an action in equity pending in said federal court; the residence of the defendants in the city of Milwaukee; that the present action is brought against them by reason of acts done by them in their capacity as receivers; and that the amount in controversy exceeds $2,000. Thereafter, upon a petition signed by the defendants and by the surety upon the removal bond, showing that by mistake the petitioners had prayed for removal to the United States court for the Eastern district of Wisconsin, instead of the Western district (Ashland county being in the Western district), the defendants moved to be permitted to substitute the words "Western district" for "Eastern district" in their petition and bond. Both the petition for removal and the motion to amend were denied December 3, 1897, and the cause was noticed for trial at the September term, 1901, and

in pursuance of such notice came regularly on for trial, when the following proceedings were had, as recited in the order appealed from:

"The above-entitled action coming on for trial upon due notice thereof, Dillon & Colignon and Tomkins & Tomkins, attorneys for the plaintiff, appeared, and moved the said cause of action for trial; and Thos. H. Gill, Esq., attorney for said defendants, appearing specially therefor, moved the court to strike the above-entitled action from the calendar for the reason that the same has been removed to the United States circuit court for the Western district of Wisconsin, and is now pending therein: Now, *upon all the files and records* in the above-entitled action, and on motion of Thos. H. Gill, Esq., attorney for said defendants, it is ordered that the above-entitled action be, and the same is hereby, stricken from the calendar for the reason that the said action has been removed to the United States circuit court for the Western district of Wisconsin, and is now pending therein, and that said United States court has assumed jurisdiction and retains said action."

There is no bill of exceptions, and no further facts than those hereinabove stated appear in the return. The clerk's certificate to the papers returned certifies that they are "all the original files" in the action. From the order striking the cause from the calendar, the plaintiff appeals.

For the appellant there were briefs by *M. E. Dillon,* attorney, and *Dillon & Colignon* and *Tomkins & Tomkins,* of counsel, and oral argument by *F. J. Colignon* and *W. M. Tomkins.*

For the respondents there was a brief by *Howard Morris* and *Thos. H. Gill,* and oral argument by *Mr. Gill.*

WINSLOW, J. The singular fact which strikes the mind upon examination of the record is that there is no proof from beginning to end that the United States court has assumed to take jurisdiction of the action. When this fact was called to the attention of respondent's counsel upon the argument, he

stated that the present case and its companion, *Ashland v. Wis. Cent. R. Co., post,* p. 104, were taken up together in the trial court, and that the fact of the assumption of jurisdiction by the United States court, as stated in the answer in that action, was admitted as existing, and treated as a matter of fact to be considered by the court in both cases. This statement was not, however, admitted by the appellant's counsel either in their brief or in their argument before us, and, in the absence of any admission, it is plain that we can consider nothing but what appears on the face of the record.

The record is certified to be all before us. The order appealed from recites that it is based upon that record, but there is not a paper of any kind in it which shows, or tends to show, that the United States court has assumed jurisdiction of the action. It is true that the trial judge states in the order that he strikes the cause from the calendar for the reason that the United States court has assumed jurisdiction. Had this been recited as a fact proven on the hearing of the motion, it would doubtless be conclusive of the fact, and we should be bound to assume that it was proven by oral admission or stipulation; but, on the contrary, the order appealed from specifically recites that it is based upon the *files and records;* and thus affirmatively excludes the possibility of any other fact having been before the court than the facts appearing in the files and records. The mere recitation at the close of the order of the reason which influenced the mind of the court cannot be considered as proof of the fact in the face of the direct statement that the order was based upon written records alone which contain no proof of such fact.

We are therefore compelled to conclude that there is nothing in the case to show that the United States court has ever assumed jurisdiction of the case. So the situation appearing on the record is that the motion was made and denied in the state court, and no further steps were taken until the case was

moved for trial in the latter court. On this state of facts, there was nothing to prevent the trial from proceeding in the state court.

But it is objected by the respondent that the order striking a case from the calendar is not an appealable order, because it does not in effect determine the action, or prevent a judgment from which an appeal might be taken. Certainly, an order striking a cause from the calendar because of insufficient notice or other irregularity not affecting the question of the pendency of the action is not appealable, because it affects procedure alone and merely postpones the trial to a future term; but when such an order is based upon the ground that no such action is pending in the court it is manifest that a different question is presented. Such an order is, in effect, a ruling that the court has no jurisdiction, and hence that it can never be brought to trial or judgment in that court. Thus, in *Cooper v. Waterloo,* 88 Wis. 433, 60 N. W. 714, which was an action against a village for personal injuries suffered by reason of a defective sidewalk, an order was made striking the cause from the calendar because a third person, alleged to be primarily liable for the defect, had not been joined as a defendant. Upon appeal this order was held to be appealable, because it affected a substantial right, and in effect determined the action, and prevented a judgment from which an appeal might have been taken. That case cannot be distinguished in principle from the present case. In the present case it appears from the record that the action is still pending in the state court, that removal to the United States court has been denied, and there is nothing to show that the United States court has assumed jurisdiction notwithstanding the denial. Hence, so far as the record before us is concerned, the state court conclusively appears to be the proper court in which the case is to be tried; but that court has refused to try it, and has stricken it from the calendar, upon a ground which

will prevent its trial for all time in the future, and hence render any judgment in the action impossible.

By the Court.—Order reversed, and action remanded for further proceedings according to law.

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CITY OF ASHLAND, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY and others, Respondents.

March 13—April 1, 1902.

Appeal and error: Conclusiveness of record: Pleading: Pendency of prior action: Statutory denial of allegations of answer: Striking cause from calendar: Practice.

1. An order striking the cause from the calendar was based on the files and records in the action, certified to be all returned with the record on appeal. Such files and records showed that the defendant's answer alleged, among other defenses, that a prior action was pending in the federal court between the plaintiff and defendants' privies in title, involving the determination of the same controversy. When the present action was regularly called for trial, the defendants appeared specially and moved to strike the cause from the calendar because such previous action was pending undetermined, and the motion was granted. It did not appear from the record that any proof was made in the trial court of the truth of such allegations of the answer, nor that those facts were admitted by the plaintiff, nor that the answer was used as an affidavit. There was no bill of exceptions. *Held*, under sec. 2667, Stats. 1898, that the new matter set up in the answer,—not pleaded as a counterclaim—was denied and avoided without formal reply, and, in the absence of proof supporting such allegations, it was error to grant the motion.
2. In such case the plaintiff is entitled to rest on his statutory reply and insist that the issue raised be tried regularly as other issues of fact are tried.

APPEAL from an order of the circuit court for Ashland county: GEO. W. BURNELL, Judge. *Reversed.*

This is a companion case to the case of *Ashland v. Whit-*

comb, ante, p. 99, 89 N. W. 886. The present action is an action in equity commenced May 29, 1901, to compel the removal of certain obstructions from Second Avenue West, a public street in the city of Ashland, and to enjoin any further obstructions therein. The *Wisconsin Central Railway Company* is a domestic corporation, and is alleged to be the successor in interest of the Wisconsin Central Railroad Company. The defendant railway company appeared and answered. The answer contained certain denials and certain allegations showing the previous vacation of the supposed street. It further contained a separate defense stating, in substance, that in the year 1893 the Wisconsin Central Railroad Company, the predecessor of the answering defendant, was insolvent, and in a certain action in equity pending in the United States circuit court for the Eastern district of Wisconsin all of its property was turned over by said court to Whitcomb and Morris as receivers; that on the 26th of July, 1897, an action was brought by the plaintiff herein against said receivers in their official capacity to compel the removal of certain obstructions from Fourth Avenue West, which was alleged to be a public street in said city; that said action was removed to, and is now pending in, the United States circuit court for the Western district of Wisconsin, and that about the 25th day of August, 1900, the said officers filed a cross bill in said action wherein they alleged the vacation by the city of certain streets, including both Second and Fourth avenues, and prayed that the rights of the parties in said street be adjudged, and that said United States court assumed jurisdiction of said cross bill, and that pursuant to due process the city appeared and demurred to the same; that said action is still pending and unadjudicated in said court; and that thereby exclusive jurisdiction of all matters at issue in this action has been assumed by said United States court. The defendant the *Armour Packing Company* appeared and answered, admitting that it occupied a building upon the lands which

are claimed to be a street in this action, and alleging that it occupied the same as tenant only of the *Wisconsin Central Railway Company*. This action was noticed for trial, and, being reached upon the calendar, the following proceedings took place, as recited in the order of the court:

"The above-entitled action coming on for trial upon due notice thereof, Dillon & Colignon and Tomkins & Tomkins, attorneys for the plaintiff, appeared, and moved the said cause for trial; and Thos. H. Gill, Esq., attorney for said defendants the *Wisconsin Central Railway Company* and the *Armour Packing Company*, appearing specially therefor, moved the court to strike the above-entitled action from the calendar for the reason that an action is pending in the United States circuit court for the Western district of Wisconsin, wherein the same issues are pending, and that said United States circuit court has jurisdiction thereof: Now, upon all the files and records in the above-entitled action, and on motion of Thos. H. Gill, Esq., attorney for said defendants the *Wisconsin Central Railway Company* and the *Armour Packing Company*, it is hereby ordered that the above-entitled action be, and the same is hereby, stricken from the calendar for the reason that the said United States court has assumed jurisdiction and retains said action."

From this order the plaintiff appeals.

For the appellant there were briefs by *M. E. Dillon*, attorney, and *Dillon & Colignon* and *Tomkins & Tomkins*, of counsel, and oral argument by *F. J. Colignon* and *W. M. Tomkins*.

For the respondents there was a brief by *Howard Morris* and *Thos. H. Gill*, and oral argument by *Mr. Gill*.

WINSLOW, J. There is no bill of exceptions in the case. The order striking from the calendar was based upon the files and records in the action, which are certified to be all here. Those files and records simply show that the city brought an action to compel the removal of obstructions from an alleged street, and that the railroad company answered, alleging,

among other defenses, that a prior action was pending in the United States court between the plaintiff and the defendants, privies in title, involving the determination of the same controversy; that when the present action was regularly called for trial the defendant railway company appeared specially, and moved to strike the cause from the calendar, for the reason that said previous action was pending undetermined, and the motion was granted.

It does not appear that any proof was made in the trial court of the truth of the allegation in the answer that another action involving the same controversy was pending between the parties, nor does it appear that the fact was admitted by the plaintiff, nor that the answer was used as an affidavit upon the motion. It seems simply to have been a motion made upon the pleadings as such. Under our practice, the new matter set up in the answer, not being pleaded as a counterclaim, was deemed to be denied or avoided without formal reply. Stats. 1898, sec. 2667. Therefore, when the case was called for trial, the defendants' answer of another action pending was, in legal effect, met by a sufficient reply either by way of denial or avoidance. For all that appears in the record, the plaintiff stood upon such reply, and was ready for trial of the issue. We do not understand that, when a plaintiff is met by the answer of another action pending, such answer is assumed to be true, or that the plaintiff is required to admit its truth, or file affidavits to the contrary, in order to defeat a motion to strike the case from the calendar made at the opening of the trial. Of course, he may admit its truth if he chooses, or consent that the motion be heard and decided upon the answer used as an affidavit, but he is entitled to rest upon his statutory reply, and insist that the issue raised be tried regularly as other issues of fact are tried. There is nothing in the record to show that he made any admission or consented to anything but a regular and orderly trial of the case. Under such circumstances, an order striking the cause from the cal-

endar, merely because it was alleged that a previous action was pending between the parties, was clearly erroneous. The question of the appealability of the order is sufficiently treated in the case of *Ashland v. Whitcomb, ante,* p. 99, 89 N. W. 886.

By the Court.—Order reversed, and action remanded for further proceedings according to law.

QUAYLE, Appellant, vs. BAYFIELD COUNTY and others, Respondents.

March 13—April 1, 1902.

Appeal and error: Appealable orders: Demurrer coupled with answer: Practice: Waiver: Taxpayer's action: Equity: Temporary injunction: Abuse of discretion: County boards: Authority to compromise claims: Void claims: Public service: Laches.

1. In a taxpayer's action to restrain payment by a county of a claim alleged to be void, defendants' answer contained a demurrer to the complaint for insufficiency, and also allegations justifyin the allowance of the claim. A temporary injunction having issued, on the cause being regularly called for trial, the court dissolved the injunction and dismissed the action for want of equity, the whole controversy submitted to the trial court being made to turn on the questions raised by the demurrer. *Held,* that whatever irregularities existed in interposing the demurrer or in the disposition thereof by said order were waived, and, it being in effect an order denying a temporary injunction and sustaining a demurrer, the order was appealable under subd. 3, sec. 3069, Stats. 1898.
2. The rule that a temporary injunction will be denied where all the equities of the complaint are unequivocally denied by answer under oath, does not apply to a case where, notwithstanding the denials contained in the answer, or in that and supporting affidavits, there is yet reasonable probability that the defendant may ultimately be found in the wrong, and that, without temporary restraint pending the litigation, the suit will be entirely ineffective notwithstanding the plaintiff may recover judgment.

3. In a taxpayer's action to restrain a county from paying a claim alleged to be void, the complaint contained allegations reasonably entitling him to the relief demanded. The answer denied all the equities of the complaint. *Held*, under the circumstances alleged, that it was an abuse of discretion for the court to refuse to preserve, during the litigation, the *status quo* upon such terms as would protect the plaintiff if he finally succeeded, or in some other appropriate way control the situation so that the judicial remedy would serve its purpose.
4. While county boards have power to settle doubtful claims, and a claim may be considered doubtful, although reduced to judgment, if the judgment is open to reversal in a higher court and proceedings are pending to that end, such power cannot be extended to claims which are, obviously, absolutely void.
5. Where a municipal judge, empowered by a resolution of the county board to rent a suitable room for holding his court, rents his own property therefor, he is one of the officers, and the transaction is a public service within the meaning of sec. 4549, Stats. 1898 (prohibiting public officers from being pecuniarily interested in any contract with public corporations in relation to any public service), and such contract is absolutely void.
6. An attempted settlement and payment of such claim, after an adjudication by a trial court that it was baseless, and during pendency of an appeal therefrom, is a reckless use of official position by the county board, for which even alleged advice of the district attorney is not a palliating circumstance.
7. A taxpayer, who commenced his action shortly after a county board had allowed an illegal claim, but before a county order for its payment was completely perfected for delivery, is not guilty of laches.

APPEAL from an order of the circuit court for Bayfield county: JAMES J. DICK, Judge. *Reversed.*

Taxpayer's action to restrain payment of an alleged void claim to defendant *Warden* by *Bayfield* county.

Ch. 38, Laws of 1895, created a municipal court for *Bayfield* county, and provided that the judge thereof should hold his office in the court room of the county court house, or other suitable room in the village of Washburn in said county, provided by its board of supervisors. The board, by resolution, delegated its power in that regard to *Warden*. He was the

judge of said court. The county limited the rent to be paid to $12 per month. *Warden* executed such power so as to enter into contract relations with the county. He became its landlord and the county his tenant. For the first six months of his term of office he rendered bills to the county for rent to the amount of $12 per month, which were paid. He did not present any bills for rent thereafter during his term of office. At the expiration thereof he presented a bill against the county for rent covering the balance of his term, amounting to $504. The county board neglected to act upon the bill, whereupon *Warden* treated their conduct as a disallowance thereof and duly appealed to the circuit court for *Bayfield* county, where, upon trial, the claim was held to be wholly void, and a judgment for costs was accordingly rendered against the claimant. He thereupon appealed to this court, and while such appeal was pending he proposed to the county board that he should take, in full settlement of his claim, the face thereof less taxable costs against him in the circuit court, and pay the costs incurred in the supreme court. The board accepted such proposition, the district attorney of the county advising that they had a legal right to do so. They authorized the execution of a county order and a delivery thereof to *Warden* consummating the settlement. Thereupon an order for $483.08 was partially prepared for delivery, but before such delivery could occur this action was commenced and a temporary injunction was issued restraining the consummation of the settlement till a hearing could be had on an order to show cause why defendants should not be so restrained till the termination of the litigation.

All the facts detailed appeared by the complaint and answer. The complaint contains a statement of all the facts, other than those particularly detailed, necessary to the right of a taxpayer to intervene and prevent the county funds from being used as contemplated. It further states that at the time of the proposed settlement there was no valid claim against

Bayfield county in favor of *Warden;* that the alleged claim was wholly void and had been judicially decided to be so, and that it was not a proper subject for the county board to act upon and settle. Defendants' answer contained a demurrer to the complaint for insufficiency, and, in addition, a statement of the facts as regards *Warden* being authorized to procure a place to hold his court, and an allegation that he acted in good faith in the matter. The answer further set forth all the facts that have been detailed in respect to the attempted settlement, and that the members of the board, in what they did, supposed the claim to be a proper subject for adjustment with *Warden;* and that the district attorney so advised.

The cause was placed on the calendar of the court for trial, and upon its being called for trial a motion was made to discharge the order to show cause and to dismiss the action for want of equity. Thereupon the right of the plaintiff to a temporary injunction, and the demurrer, were submitted to the court for decision. The motion was granted, and an order was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Sanborn & Sanborn,* and oral argument by *A. W. Sanborn.*

For the respondents there was a brief by *Reed & Reed,* and oral argument by *Myron Reed.*

MARSHALL, J. Respondents suggest at the outset that the order is not appealable because it does not, in effect, terminate the action and prevent a judgment from which an appeal could be taken, citing subd. 1, sec. 3069, Stats. 1898. If this were a mere order dismissing the action, as counsel seem to assume, we would be compelled to dismiss the appeal for want of jurisdiction. But it is not such an order. There was a demurrer to the complaint, as indicated in the statement of facts. Regardless of how irregularly the demurrer was interposed, no objection was taken thereto, and we will, therefore, not taken notice thereof now. By the way the cause was dis-

posed of, it is obvious that counsel on both sides, and the court, regarded the demurrer to the complaint, and the question of whether appellant should be temporarily restrained, as submitted for decision together. In denying the application for temporary restraint, no suggestion was made, as appears by the order, that it was grounded on the denials contained in the answer, or any showing made by respondents. The entire controversy submitted was made to turn on the question raised by the demurrer to the complaint for want of equity. The trial court obviously considered that objection well taken, and that all the facts appellant could present were before the court, so that it was useless to grant leave to amend. Sufficient attention, it seems, was not paid to rules of pleading in interposing the demurrer, nor to the proper disposition thereof in framing the order. Whatever irregularities there were seem to have been waived, and we will treat the order the same as the parties and the court did, that is, as an order denying a temporary injunction and sustaining the demurrer to the complaint. In that view it is appealable under subd. 3, sec. 3069, Stats. 1898, as to both phases thereof.

Counsel for respondents endeavor to sustain the order, so far as it refused a temporary injunction, by the rule often stated, and often misunderstood, that where all the equities of the complaint are unequivocally denied by answer under oath, a temporary injunction will be denied. As we have seen, the trial court did not base the decision complained of on that rule, nor did he consider it at all. However, we will briefly discuss counsel's contention. Probably no judicial rule is more liable to be misunderstood and misused than the one invoked. Courts and counsel often make the mistake of supposing that it is a universal rule, while the fact is that it is subject to so many exceptions that the mere statement of it, in the language usually employed for that purpose, is very misleading. The rule does not apply to a case where, notwithstanding the denials contained in the answer, or in that

and supporting affidavits, there is yet a reasonable probability that the defendant may ultimately be found to be in the wrong, and that, without temporary restraint upon him pending the litigation, the suit will be entirely ineffective notwithstanding plaintiff may recover judgment. In that situation the court is not bound, absolutely, to refuse temporary restraint upon the defendant pending the litigation. In some circumstances it is abuse of discretion not to, in some way, upon just terms—either by enjoining the defendant from doing those things during the litigation which, if done, will render the remedy invoked valueless if plaintiff establishes his cause of action, or by temporarily preserving the *status quo* upon such terms as will protect the plaintiff if he finally succeeds, or in some other appropriate way,—control the situation so that the judicial remedy will serve its purpose. *Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436, 78 N. W. 1096. So much has been said upon this subject in recent years that it is difficult to add anything that will be helpful to the bench and bar to prevent erroneously applying the rule for which counsel contend. We repeat and affirm what was said in *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 486, 84 N. W. 870, 877:

"Notwithstanding the conflict between complaint and answer as to the facts or the law, it is still within the discretionary power of the court, by a temporary injunction, to preserve the *status quo* between the parties pending the final decree and to prevent the doing of the acts complained of during such pendency if that be necessary to save the plaintiff or the defendant from irreparable injury by the conduct of his adversary in the meantime. Not only does the discretionary power exist to protect a party against such danger, but the duty exists to exercise it by making some reasonable provision to prevent such injury. In such cases, necessarily, the court should proceed with care, neither arbitrarily refusing to grant or continue an injunction, nor the reverse. The situation of the respective parties should receive careful consideration.

If restraint upon the defendant will not subject him to danger of any serious loss and he can be amply secured against that danger by a bond, and without such restraint the plaintiff will be in danger of suffering serious loss that cannot be adequately guarded against by a bond, good judgment may require such restraint with proper conditions. In other situations, a wise administration may demand a different course; but whatever the situation may be, it is in the power of a court of equity to so shape its administration as to reduce the danger of a miscarriage of justice as low as human foresight can do it. A failure to exercise judicial power to protect litigants so far as practicable from probable loss, upon the theory that there is some arbitrary rule that displaces such power under certain circumstances, is error, and an unreasonable exercise of such power by refusing temporary restraint, where there is a clear necessity therefor, is an abuse of such power."

The circumstances of this case, if the complaint shows a good cause of action, required the court to preserve the *status quo* during the litigation. That seems clear under the foregoing rule. The only purpose of the suit was to prevent an illegal disbursement of public money. If, pending the action, the money were paid out, obviously the end sought would be entirely defeated regardless of the merits of the suit. Restraint upon the respondents was necessary to prevent a probable irreparable loss to the county and to appellant. Such restraint meant no injury whatever to any of respondents, except, perhaps, interest on the claim.

In holding that the complaint was bad for want of equity, the learned court seems to have supposed that the claim for rent was not absolutely void, therefore that it constituted a legitimate subject for settlement by the county board; that since judicial remedies were dealing with the matter at the time the settlement was effected, the claim was then sufficiently a disputed matter, which the county board had a right to deal with, notwithstanding they had once rejected it and on appeal the circuit court had decided that it was invalid, to authorize them to make the settlement. The court may

further have been of the opinion that appellant had lost his right to invoke equity, by laches.

It may be conceded that county boards, under the principles laid down in *Washburn Co. v. Thompson,* 99 Wis. 585, 75 N. W. 309, have power to settle doubtful claims, and that a claim is not so far removed from the region of doubt as to prevent their dealing with it, merely because of a judgment in respect thereto in a trial court, if the judgment is open to reversal in a higher court and proceedings are pending to that end. That rule cannot be extended, however, to include claims which are, obviously, absolutely void. It would be a very dangerous rule to adopt—one which would be without support in either reason or authority—that a claim, having no support either in law or equity, merely because put forward against a county, is a doubtful claim, which its board may rightfully settle and use the public funds therefor. In order that a claim against a county may be rightfully said to be doubtful, there must be some reasonable ground for saying that it is legitimate. We are unable to say that the one in question satisfies that test. *Warden* was a county officer. He was prohibited by a penal statute from being pecuniarily interested in any contract with the county in relation to any public service. Sec. 4549, Stats. 1898. The furnishing of a court room to the county was public service within the meaning of that statute. A contract made in violation thereof is not merely voidable. It is absolutely void. *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964. For the county board to have audited *Warden's* claim when they had jurisdiction to pass upon it would have been a clear ursurpation of power, a misuse of public funds without any mitigating circumstance except ignorance of the law. The attempted payment of the claim, after an adjudication by the court that it was baseless, was a reckless use of official position. Even the alleged advice of the district attorney does not constitute a palliating circumstance. For a county board to point to the district attorney for justification

in respect to conduct so clearly wrong as not to admit of justification does not palliate their act in law or in equity. It only makes him an accessory to their misconduct.

There is no ground, that we can perceive, for holding that plaintiff lost his right to prosecute this suit by laches. His right in the matter was of a primary character. It was complete without any demand upon the county officers to resort to judicial remedies to prevent the threatened wrong. *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. There is nothing to show that he had any reason to suspect danger of the claim being settled at the expense of the county funds till shortly before the suit was commenced. It was commenced substantially as soon as the necessity therefor developed. No act on the part of respondents or either of them can be attributed to acquiescence of appellant or the class for whom he stands. If he did not act at the very first indication of the danger of misuse of public funds, the delay was neither such as to indicate acquiescence, nor such as to in any way operate to the prejudice of the claimant.

Our conclusion is that the decision of the trial court that appellant's complaint is bad for want of equity cannot be sustained, and that it was an abuse of judicial discretion, under the circumstances, to refuse to restrain the county officers from carrying out the arrangement with *Warden* till the final termination of the litigation upon the merits. The facts set forth in the complaint are sufficient, when established, to entitle plaintiff to the relief prayed for. The answer expressly, or by implication, admits that the complaint states the truth. Temporary restraint was necessary to render the final result of the litigation effective.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to this opinion.

STENZ and another, Respondents, vs. MAHONEY, imp., Appellant.

March 13—April 1, 1902.

Easements: Extinguishment: Construction of deed.

The owners of a lot conveyed to plaintiffs a part thereof on which there was a two-story building, and granted to them also the use of a stairway "as the same is now constructed and used, and on and adjoining" the property conveyed, "so long as the same shall there remain." The deed attempted also to create a permanent easement for a stairway three feet wide, to be used in common, one half on the land conveyed to plaintiffs and one half on the adjoining part of the lot, afterwards conveyed to defendant. The building on defendant's part of the lot, in which was the stairway, was about fourteen inches over the line upon plaintiff's part, and they compelled her to move it and the stairway entirely upon her own land, and then moved their building up to the division line, refusing her offer to make with them a common stairway, one half on each side of the line. *Held*, that no permanent easement in the existing stairway had been granted, and that plaintiffs had, by their conduct, extinguished the temporary easement and had no further right to use defendant's stairway located entirely on her own land.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

On and prior to July 23, 1890, the defendants Kate and Michael Murray owned the west forty feet of the east sixty-five feet of lots 13, 14, and 15 in block 84 of Ellis's division of Ashland. On the day last mentioned they executed a warranty deed of the west twenty feet of said land to the plaintiffs, which contained the following clause:

"Together with the use of a stairway as the same now is constructed and used, and on and adjoining said property on the east side thereof, and to have free access and use of said stairway so long as the same shall there remain, for the purpose of ingress and egress to the building on the property purchased, and for any and all lawful purposes whatever con-

nected with the use and enjoyment of the building or buildings now or hereafter erected on the purchased property, together with the use of the east one and one-half (1½) feet off the east forty-five (45) feet of said lots; grantors and assigns to retain and have free use forever in common with grantees forever of one and one-half (1½) feet of the east side of the property hereby conveyed, being and intended for three (3) feet in all, for use in common for stairway."

At the time of said conveyance there was on the tract conveyed a two-story frame building. There was also a similar building on the tract immediately east, but which set over on the tract conveyed to plaintiffs about fourteen inches. In the last-named building, at its westerly side, was a stairway leading to the second story, from which there was a platform leading to the second story of the building on plaintiffs' land. This stairway was used in common by the occupants of both buildings until the time hereinafter mentioned. On July 21, 1900, the Murrays conveyed the west twenty feet of the east forty-five feet of said lots to the defendant *Mary C. Mahoney.* At the time of said purchase the latter believed that her building encroached upon plaintiffs' property to the extent of one and one-half feet. Soon after such purchase plaintiffs notified the defendant *Mahoney* to move her said building entirely upon her own lot. This she did, and plaintiffs moved their building up to the east line of their lot. While the matter was pending she offered to give the use of a foot and a half on the west side of her property to be used with a foot and a half on the east side of plaintiffs' property as and for a common stairway. This offer was refused, and the plaintiffs moved their building to the east line of their lot, and claimed the right to use the stairway in defendant's building after it had been removed entirely upon her own land.

In April, 1901, the defendant *Mahoney* commenced the improvement of her building, tore down the stairway in question, and obstructed the doorway leading thereto. Plaintiffs then brought this action to reform their deed from the Mur-

rays, to restrain the defendant *Mahoney* from interfering with the easement conveyed or secured by their said deed, and to require her to restore the stairway in question. No service has been had upon the Murrays, nor have they appeared in the action. The complaint sets out a mistake in plaintiffs' deed, and it is admitted on both sides that it does not correctly describe the easement sought to be reserved.

The facts above stated appear by the complaint, answer, and affidavits used on plaintiffs' motion for a temporary injunction. Upon the hearing the court entered an order restraining the defendant *Mahoney* from interfering with plaintiffs' right to use the stairway mentioned, and requiring her to restore the premises to the condition in which they formerly were, and to remove all obstructions to their free use by the plaintiffs. Said defendant appeals from the order so entered, having given an undertaking for costs and to stay execution of said order.

For the appellant there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.*

For the respondents there was a brief by *Dufur & Alvord,* and oral argument by *J. F. Dufur.* As to the construction of the contract granting the use of the stairway, they cited *Mayo v. Newhoff,* 47 N. J. Eq. 31, 19 Atl. 837.

BARDEEN, J. Under no possible theory of the case are we able to see how plaintiffs are entitled to an easement in a stairway three feet wide entirely on defendant's land. It must be assumed that the Murrays knew of the relative situation of the buildings at the time of their deed to plaintiffs. Such deed, after describing the tract conveyed, says, "together with the use of a stairway as the same is now constructed and used, and *on and adjoining* said property on the east side thereof, and to have free access and use of said stairway so long as the same shall there remain," etc. Then follows an attempt to provide for a permanent easement for a stairway to be used

in common, three feet wide; one half to be on plaintiffs' land, and the other on the premises now owned by the defendant. By using the word "east" instead of "west" in describing its location, the deed carried the easement away from the plaintiffs' land. It seems perfectly evident that the parties did not intend a perpetual easement to be created as to the stairway in use at the time the deed was made. The deed speaks of such stairway as being "on and adjoining" the property conveyed, and grants the use thereof so long "as the same shall there remain." So long as it remained as it then existed, it was to be used in common. There was no restriction as to either party's changing the conditions. There was no attempt made to create an easement to be entirely upon the property to the east. On the contrary, the intention plainly manifest is that the perpetual easement should rest equally on each tract, and apt words were used to indicate that intention, except for the mistake mentioned. The defendant admitted that to have been the purpose in the deed when she offered to permit her premises to be used for a stairway in connection with an equal strip of plaintiffs' land. The plaintiffs seem not to have been satisfied with this offer. They compelled defendant to remove her building and stairway as it existed when the deed was made, entirely upon her own land, and then blocked the one and one-half feet on the east side of their building, intended for the common stairway, by moving their building to the east line of their lot. They now insist upon a right to use the stairway entirely upon defendant's premises. We do not think this claim is sustainable under the deed mentioned.

"Every privilege which one man claims in derogation of the rights of another is viewed with jealousy by the law, and it will require it to be confined to the prescribed limits and specified object of the grant." *Taylor v. Hampton*, 4 McCord, 96.

Rights of the sort claimed by plaintiffs are servitudes, and may be extinguished by act of God, operation of law, or by the act of the party. A servitude may be extinguished by renunciation of the party entitled to it, either express or implied. When the act which prevents the servitude is by the party to whom the servitude is due, it is wholly extinguished. Any act wholly incompatible with the nature and exercise of the servitude is sufficient to extinguish it. These principles are laid down and elaborated in the case cited, and have been recognized and enforced in this state. *Dillman v. Hoffman,* 38 Wis. 559. See *Duncan v. Rodecker,* 90 Wis. 1, 62 N. W. 533; *Corning v. Gould,* 16 Wend. 531. They have direct application to this case. When plaintiffs required defendant to change the condition existing at the time the deed was made, there was an implied renunciation of the easement as it then existed. When they moved their building onto the strip reserved for the common stairway, such conduct was incompatible with the easement attempted to be created by the deed. The original easement was one to be used in common so long as existing conditions continued. When they were changed, the intent was perfectly evident that each tract should bear a part of the common burden. Plaintiffs, by an adverse permanent obstruction of the common easement, left it within the power of the defendant to elect to declare the easement extinguished. Whether that has been done in this case, we need not stop to inquire. It is sufficient for the purposes of this appeal to say that plaintiffs' conduct has extinguished the temporary easement as created by the first clause in the deed, and that they cannot now claim to use defendant's stairway, located entirely upon her own land.

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to enter an order denying the temporary injunction prayed for, and for further proceedings according to law.

CATE, Respondent, vs. WERDER and wife, Appellants.

March 13—April 1, 1902

Tax titles: Description of land: Certainty.

Under sec. 1047, Stats. 1898, providing that any description which shall indicate the land with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance shall be sufficient in tax certificates, a strip sixty-eight feet deep out of the west twenty-five feet of block 110—being the west twenty-five feet of lots 11 and 12, and the north eighteen feet of the west twenty-five feet of lot 10—is *held* to be sufficiently described in a tax certificate as, "W. 25 ft. by 68 ft. deep of lots 9, 10, 11, 12, block 110," although it did not in fact extend into lot 9 at all.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to foreclose a tax certificate on the sale of 1892, containing as description:

Description.	Sec.	Town.	Range.	Lot.	Blk.	Dol. Cts.
City of Ashland, Ellis division, w. 25 ft. by 68 ft. deep of				9, 10, 11, 12.	110.	198.28
			In said county.			

The principal defense was denial of sufficient description to distinguish any real estate, and especially to apply to that belonging to the defendants, which was described in their deed as:

"The west 25 by 68 feet of block 110. This means the north 18 feet of the west 25 feet of lot 10, and the west 25 feet of lots 11 and 12 in block 110, Ellis division of the city of Ashland."

It appeared that the assessment of 1891, on which this certificate was based, used the same description and named defendants' grantors, Ferdinand and Ottillie Schupp, as owners. The Schupps then owned the premises now owned by the defendants, which had been conveyed to them by the same

description, and which were in fact a strip of land in the northwest corner of block 110, twenty-five feet wide east and west, and sixty-eight feet deep north and south, fronting on Second street, which was the principal business street of the city, and occupied by a store building. The west half of block 110 consisted of twelve lots, numbered consecutively from 1, at the south end, to 12, at the north end, and bounded on the west by Third avenue and on the north by Second street. The lots were twenty-five feet wide, so that the sixty-eight-foot strip extended over the westerly ends of lots 12 and 11, and eighteen feet of the westerly end of lot 10, but did not reach lot 9. The court held that the assessment certificate sufficiently described the premises belonging to the Schupps at the time of assessment, and to the defendants at the time of the action, and rendered judgment of foreclosure in accordance with the prayer of the complaint, from which the defendants appeal.

For the appellants there was a brief by *Dillon & Colignon,* and oral argument by *F. J. Colignon.*

For the respondent there was a brief by *Sanborn & Sanborn,* and oral argument by *A. W. Sanborn.*

DODGE, J. The conclusion of the trial court is obviously correct. Sec. 1047, Stats. 1898, requires that the descriptions in tax certificates and other proceedings have the same construction as in conveyances between parties, and may be aided in their application to specific property by the same quality and character of extrinsic evidence. *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185. No one can doubt that had a deed from the Schupps to the defendant contained the same description as the certificate, and it had been shown that the Schupps owned the strip of land which they in fact did own, and no other, in block 110, the deed would be held to sufficiently describe and convey that property. It is a strip of land sixty-eight feet deep out of the west twenty-five feet

of the whole of block 110, and its certainty, in view of the existing facts, cannot be seriously obscured by the incident that it is described as sixty-eight feet deep out of the west twenty-five feet of lots 9, 10, 11, and 12, although it does not extend into lot 9 at all.

By the Court.—Judgment affirmed.

EMERSON and another, Respondents, vs. SCHWINDT and another, Appellants.

March 13—April 1, 1902.

Land contract: Foreclosure by assignee: Conveyance of legal title: Amendment of pleading.

1. Defendant, who was in possession of land under a parol agreement for its purchase from a corporation, made a written contract therefor with the receiver of the corporation, giving notes for the purchase price. By order of court the receiver sold the contract and notes and gave a quitclaim deed of the land to one who afterwards assigned the contract and notes and conveyed the land to plaintiffs. After the discharge of the receiver, the corporation quitclaimed to defendant. *Held*, that upon a conveyance by plaintiffs to defendant the legal title would vest in the latter; that he could not retain possession as against plaintiffs without paying for the land according to the contract; and that plaintiffs were therefore entitled to foreclose the contract.
2. Where a judgment is reversed because certain essential facts do not appear, and the cause is remanded with direction to allow such facts to be shown, it is not error, though perhaps unnecessary, to allow the complaint to be amended so as to allege such facts.

APPEAL from a judgment of the circuit court for Price county: JAMES J. DICK, Judge. *Affirmed.*

For the appellants there was a brief by *G. E. Schwindt,* in person, and *Warner & Jackman* of counsel, and oral argument by *E. N. Warner.*

James O'Leary, for the respondents.

CASSODAY, C. J. This is an action to foreclose a land contract against the vendee in possession. When the case was here on the former appeal, the essential rights of the parties were determined. *Emerson v. Schwindt,* 108 Wis. 167, 84 N. W. 186. So far as the facts are there stated, they need not be here repeated. The judgment was there reversed because the record failed to show that the Jump River Lumber Company, the vendor in the land contract, had ever parted with the legal title to the land, or that the receiver of that corporation had ever sold or offered to sell the legal title to the land to any one,—much less to Rollins, who purchased the notes and land contract at the receiver's sale, and from whom the plaintiffs thereafter acquired the same.

In pursuance of the mandate on such former appeal, the *remittitur* was filed, and the cause was heard, and evidence was presented from which the court found, in addition to the facts appearing in the former record, that June 5, 1896, the receiver of the Jump River Lumber Company duly executed to Rollins a quitclaim deed of the premises described, and that the same was recorded; that December 9, 1896, the receiver was discharged; that June 22, 1897, Rollins and wife duly executed to the plaintiffs a special warranty deed of the same premises; that September 18, 1897, the outstanding tax certificates were all purchased by the plaintiffs; that the notice of *lis pendens* was filed in this action December 29, 1897; that December 26, 1900, the Jump River Lumber Company duly executed to the defendant *G. E. Schwindt* a quitclaim deed of the premises described, and the same was duly recorded January 25, 1901; that the defendant *Alice C. Schwindt* is the wife of the defendant *G. E. Schwindt;* that December 13, 1900, the plaintiffs and their wives duly executed a warranty deed of the premises described to the defendant *G. E. Schwindt,* in accordance with the written agreement, so as to entitle the same to be recorded, and brought the same into court at the trial, and formally tendered the same

to the defendants upon the payment of the amount due to the plaintiffs upon the contract, with costs, and deposited the same with the clerk of the trial court in escrow, to be delivered upon such payment into court of the amount adjudged to be due, with costs.

And as conclusions of law the court found, in effect, that the deed from the Jump River Lumber Company to *G. E. Schwindt* inured to the benefit of the plaintiffs to the extent that the defendants were not allowed to claim that the deed of the plaintiffs did not convey in fee simple to *G. E. Schwindt* the title to the premises which that corporation formerly owned, free and clear of all legal liens and incumbrances; that the plaintiffs were entitled to the relief demanded in the complaint,—and ordered judgment for the plaintiffs upon such findings of fact and conclusions of law. From the judgment entered thereon accordingly, the defendants appeal.

Such additional findings of fact and those previously in the record are sufficient to support the judgment, and the findings are amply sustained by the evidence. The procedure of the trial court appears to have been in accordance with the mandate of this court upon the former appeal, which is to the effect that the cause was remanded with directions to allow the plaintiffs, if they could, to present to the court a conveyance of the legal title to the effect as mentioned in the opinion, or that the other parties necessary to a complete determination of the controversy be brought in, and the rights of all parties be determined by the judgment to be entered, and for further proceedings in accordance with the opinion therein. *Emerson v. Schwindt,* 108 Wis. 167, 174, 84 N. W. 186. It is claimed that the court improperly allowed the complaint to be amended by alleging the additional facts so proved and found. The mandate expressly authorized such proof to be made, or other parties to be brought in, and it may be doubtful whether any such amendment was necessary. Certainly the defendants were in no

way prejudiced by such amendment. *Jones v. Jones,* 71 Wis. 513, 38 N. W. 88. The contention that the deed from the Jump River Lumber Company did not inure to the benefit of the plaintiffs, because it ran to *G. E. Schwindt,* instead of both defendants, is without significance. It complied with the terms of the contract, and that is enough. The contention seems to be that the defendants can retain possession of the land without paying according to the terms of the contract by which they obtained such possession, and when there is no longer any outstanding title or claimant. Such claim cannot be maintained.

By the Court.—The judgment of the circuit court is affirmed.

FULLER and others, Respondents, vs. ABBE, Appellant.

March 13—April 1, 1902.

Lien: Sale of land: Judgment for deficiency.

A final judgment, unappealed from, establishing a trust in favor of plaintiffs in land held by defendant, gave the latter a lien upon plaintiffs' interest and provided that in default of payment their interest should be sold to satisfy the same, but did not provide for any personal judgment in case of a deficiency arising on the sale. *Held,* that there could be no such judgment for deficiency.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant upon briefs by *Tomkins & Tomkins,* and for the respondents upon the brief of *E. C. Kennedy.*

WINSLOW, J. In 1892 the defendant had record title to about sixty lots of land in Ashland, and this action was brought by the four plaintiffs, who were the defendant's

brothers and sisters, claiming that she held four fifths of said land in trust for them, and asking that their rights in said lands be determined and that defendant be required to account for moneys received for lands previously sold by her held under the same trust. The defendant denied the plaintiffs' alleged rights in the lands, and claimed to be credited advances made by her in the way of taxes, and for other purposes; and the action was tried, and resulted in a judgment establishing the title of the plaintiffs, each to an undivided one-fifth of the lands in question, and adjudging that there was due the defendant, for sums advanced by her for taxes and expenditures concerning the lands, the sum of $396.26, upon payment of one fourth part of which sum each plaintiff was entitled to a conveyance from the defendant of an undivided one-fifth part of the lands. The defendant appealed from that part of the judgment which determined that she was only entitled to $396.26, and this court modified the judgment so as to allow certain claims of the defendant and disallow one item which had been charged against her, and affirmed the judgment as modified. *Fuller v. Abbe,* 105 Wis. 235, 81 N. W. 401.

Upon return to the trial court the original findings and judgment were modified so as to determine that there was a balance due the defendant on the accounting of $1,480.73, and that defendant was entitled to a lien upon the interest of each plaintiff in said lands of one fourth of said sum, to wit, for the sum of $370.18, and that, upon payment by each plaintiff of said last-named sum, the plaintiff so paying was entitled to a deed of an undivided one-fifth of said lands, and that in default of such payment within ninety days the interest of the person so defaulting be sold by the sheriff in the manner provided for sales of land upon execution. Neither the original nor the amended judgment contained any provision for a personal judgment for deficiency. None of the plaintiffs paid the sums required to be paid, and the

undivided four-fifths of the lands went to sale, and the sale resulted in a deficiency of $1,463.27; whereupon the defendant moved upon the findings, amended decree, and report of sale for judgment against the plaintiffs for such deficiency, which motion was denied, and the defendant appeals from the denial.

It is apparent that the court rightly denied the motion for a deficiency judgment after the sale of the lands. Judgment had already been entered in the case. It was not an interlocutory judgment, reserving some questions, but a final judgment, settling all the rights of the parties. It did not provide for any personal judgment in case of a deficiency arising on the sale; all that remained to be done in the action was to execute the judgment, i. e., to make sale of the premises and to bring the excess into court and distribute it, if any excess resulted. The defendant did not appeal from the judgment, and it is not apparent to us how the court could add any material provisions to that judgment after sale of the premises. It is true that in case of a mortgage foreclosure judgment a personal judgment for deficiency may be rendered after the foreclosure sale; but this is required to be *ordered* in the original judgment, and it is authorized only by a special statutory provision applicable only to mortgage foreclosures. Stats. 1898, sec. 3156. Whether, under the circumstances of the present case, the defendant would have been equitably entitled to a personal judgment against the plaintiffs after having repudiated her trust, we are not called upon to determine. She did not ask it in her answer, nor did she obtain it in the judgment. That judgment was final, and unappealed from, and additions cannot be made to it in the manner proposed by the defendant.

By the Court.—Order affirmed.

114 130 RICE and others, Respondents, vs. ASHLAND COUNTY, Appellant.
114 *150

March 13—April 1, 1902.

Pleading: Amendment: Statute of limitations: Taxation: Counties: Void sale of land: Recovery of purchase money: Interest: Subsequent transfers by purchaser: Reduction of recovery: Pendency of another action.

1. Refusal to permit an answer to be amended by setting up the statute of limitations is *held* not an abuse of discretion, it appearing that at the time of answering all the material relevant facts were known to defendant, or might have been known by the exercise of ordinary diligence, that were known when the application for leave to amend was made.
2. Refusal to permit an answer to be amended so as to set up the statute of limitations is not a material error where it appears that the action was commenced within the time limited.
3. A resolution of the county board authorized the clerk to sell and convey the county's interest in lands on certain specified conditions, but by mistake the clerk sold for a sum insufficient to satisfy such conditions, by reason whereof the deeds were void. The purchase money was covered into the treasury and used for legitimate county purposes. *Held*, that the purchaser had a good cause of action against the county for the recovery of such money, and that such cause of action accrued at the time when the money was actually used by the county.
4. The liability of the county to return the money in such case rests upon the broad equitable doctrine that where, in a transaction not prohibited by law or involving moral turpitude, a county or other public corporation obtains money without authority of law, and uses the same in lieu of moneys obtained or that would otherwise have to be procured by legitimate taxation, the person from whom the same was obtained not receiving any consideration therefor, the money should be restored.
5. The county was not liable in such case for interest on the purchase money prior to the demand for its return.
6. The purchasers from the county having conveyed some of the lands to third persons and being to that extent unable to restore the county to its former situation, and it not appearing that there is any liability on their part to their grantees, the amount which they may recover from the county is reduced by the amount which they received from said grantees.

7. The pendency of an action previously commenced in the federal court on the same cause of action was not a bar to proceeding to judgment in the state court.

8. Plaintiffs having paid their money to the county in good faith, the fact that they relied wholly on the clerk's computation in determining whether the amount paid was sufficient to authorize him to convey the lands, or that they were parties to the mistake in the computation, or that the clerk told them that if the deeds were void they could not recover their money, does not militate against their right to recover; and there was therefore no error in refusing to grant a new trial on the ground of newly discovered evidence to show such facts.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action for money had and received. The complaint is substantially as follows: August 7, 1886, the county clerk of Ashland county, in its behalf, received of plaintiffs *John H. Rice* and *James E. Palmer,* $17,065.73, as payment for the right, title, and interest of such county in certain lands (particularly described), which sum said clerk in good faith represented was the full amount required to be paid in order to enable him to convey the county's interest in said lands. *Rice* and *Palmer* relied on such representations and accepted quitclaim deeds, executed in due form, purporting to transfer to them such interest. They acted for themselves in the transaction, and as trustees for other persons named as plaintiffs or who appear by their personal representatives. There was a resolution of the county board purporting to authorize said county clerk to sell the county's interest in said lands and convey the same to the purchasers by quitclaim deed, on certain specified conditions. By mistake the clerk did not demand, and *Rice* and *Palmer* did not pay, a sufficient sum to satisfy such conditions, by reason whereof the deeds they received were wholly void. The money was covered into the treasury and expended for legitimate county purposes before the demand for the return thereof hereafter mentioned. August 2, 1892, plaintiffs filed a claim against the county for

such return, and at the same time delivered to the county clerk a deed in form retransferring the lands. The county board disallowed such claim, and plaintiffs duly appealed from such action to the circuit court for Ashland county. [See *Rice v. Ashland Co.* 108 Wis. 189.]

The county, by answer, put some, but not all, of the material allegations aforesaid in issue, and pleaded in abatement the pendency of a former action commenced upon the same cause of action in the United States circuit court for the Western district of Wisconsin.

On the trial there was an objection to any evidence under the complaint, also a motion for leave to amend the answer, setting up the statute of limitations, which were overruled and the rulings duly excepted to. Plaintiffs' evidence established all the facts alleged in the complaint that have been referred to. On behalf of defendant there was evidence to the effect that plaintiffs, before the claim for a return of the money was filed, conveyed their right to some of the lands to third persons, receiving from the grantees, in the aggregate, $3,566. The cause was submitted without any definite evidence on the plea in abatement. At the close of the evidence the cause was submitted to the court for decision, on both sides, with the result that a verdict was directed in favor of plaintiffs for $17,065.73, the full amount of their claim and legal interest thereon from the time the money was paid to the county clerk, to wit, August 7, 1886. A motion for a new trial was overruled and the ruling duly excepted to. Judgment was rendered upon the verdict in plaintiffs' favor.

After judgment defendant's counsel moved to set the same aside and for a new trial because of newly discovered evidence. Such evidence was to the effect that *Rice* and *Palmer* paid their money to the county knowing that they were entering upon a speculating venture and after being advised by the county clerk that in his judgment, if the deeds he delivered to them should turn out to be void, they could not recover

their money; that one Brown represented plaintiffs in dealing with the clerk; that he and the clerk acted together in figuring out the amount that should be paid to the county to comply with the resolution under which the clerk assumed to have authority to make the deeds; that the clerk did not consult with the county board at all in the transaction, but acted entirely upon his own judgment as to what he had authority to do. Further new evidence was claimed to be in the possession of appellant's counsel establishing the plea in abatement. The affidavits in support of the motion set forth in detail the reasons why the so-called new evidence was not produced upon the trial. As to the evidence in support of the plea in abatement, it was claimed that defendant's counsel, several days after the commencement of the term of court at which the cause was tried, and shortly before it was called for trial, communicated with the clerk of the United States court, requesting a copy of the record in the alleged pending action, and that such request was not promptly complied with, the result being that the papers did not reach counsel until three days after the trial was concluded. The motion was denied. This appeal is from the judgment as well as from the order entered upon the motion.

For the appellant there was a brief by *A. P. Haagenson,* district attorney, and *R. Sleight* of counsel, and oral argument by *Mr. Sleight.*

For the respondents there were separate briefs by *Lamoreux & Shea* and *Tomkins & Tomkins,* and oral argument by *W. M. Tomkins* and *W. F. Shea.* To the point that interest was properly allowed from the time the money was paid to the county, they cited *Mansfield v. Lynch* (Conn.), 12 L. R. A. 285; *Hurd v. Hall,* 12 Wis. 122, 134; *Norton v. Rock Co.* 13 Wis. 611; *Pier v. Oneida Co.* 93 Wis. 463, 102 Wis. 338; *Thomson v. Elton,* 109 Wis. 595; *United States v. Sanborn,* 135 U. S. 271; *Redfield v. Ystalyfera I. Co.* 110 U. S. 174.

MARSHALL, J. The various assignments of error will be considered in their order.

1. Did the court err in refusing to allow defendant to amend its answer, setting up the statute of limitations? The application for leave to amend was addressed to the sound discretion of the court. *Whereatt v. Worth,* 108 Wis. 291, 84 N. W. 441. We are unable to see that such discretion was abused. True, there were circumstances palliating the omission to set up the defense of the statute of limitations when the answer was interposed. Nevertheless, all the facts were then known to appellant's officers, or might have been known to them by the exercise of ordinary diligence, that were known when the application for leave to amend was made, except as to whether plaintiffs would be able to bring their alleged cause of action to a hearing. We are unable to see how that circumstance excused setting up the defense of the statute of limitations when the opportunity therefor existed, so as to warrant us in saying that it was an abuse of judicial power not to relieve appellant from the default.

A complete answer to the assignment of error, however, exists in the fact, which appears clearly, that defendant was not prejudiced by the ruling complained of. The money was paid to the county August 6, 1886, at the earliest. When it was actually applied to the use of the county does not definitely appear, but it is reasonably certain that such application did not take place till some time after the clerk received the money. Plaintiffs' cause of action for money had and received did not mature till the money was so used. The clerk had no right to receive the money at all on behalf of the county. If it had not been made a part of the public funds of the county as indicated, plaintiffs' cause of action for a return thereof would have been against the county clerk if against any one. *Thomson v. Elton,* 109 Wis. 589, 85 N. W. 425; *Smith v. Barron Co.* 44 Wis. 686. It should be noted that in the last case cited it was held that the officer receiving the

money, only, was liable, notwithstanding it had been turned into the county treasury and become a part of the county funds. It did not appear, however, that the money had been actually used by the county for its legitimate purposes. Further, the transaction in that case was one which the county board had no power to authorize. RYAN, C. J., dissented from the opinion of the court, holding that the county was liable to refund the money solely because of its having become a part of the county funds, regardless of the doctrine of *ultra vires*. The rule announced by the court has never been extended in this state to a case where authority to do the act involved might have been given and the proceeds of the transaction were actually used for legitimate county purposes, taking the place of other money accumulated or that would otherwise have been required to be accumulated in the public treasury by legal means. Plaintiffs' claim was presented to the county board for consideration August 2, 1892. Taking the most favorable view of the evidence for appellant that it will reasonably admit of, that was within six years of the time the cause of action accrued. The statute does not commence to run upon a claim till such time as it might be enforced by action (sec. 4249, Stats. 1898); and the presentation of a claim to a county board for allowance, where the law requires that method of commencing proceedings against a county, is the commencement of an action within the meaning of the statute of limitations (sec. 4242). From this it will be seen that, had the application for leave to amend been granted, it would not have affected the final result.

2. Did the court err in overruling the objection to any evidence under the complaint, or in denying appellant's motion for the direction of a verdict, or in granting plaintiffs' motion for a verdict? Those three propositions, as the record stands, may be considered together. If the complaint states a

cause of action, since the evidence establishes the essential facts therein alleged, and the first proposition must be answered in plaintiffs' favor, all must be so answered. It is considered that the allegations of the complaint satisfy all the essentials of the doctrine upon which the liability was sustained in *Thomson v. Elton, supra* (109 Wis. 589). We cannot profitably add to what was there said in regard to the doctrine involved. The law is deemed to be firmly established that if an officer of a public corporation, assuming to have authority to act in its behalf, receives the money of another in a transaction ostensibly on behalf of the corporation, which it is not prohibited by law from entering into, and such other, acting in good faith, parts with such money, and it is thereafter covered into the public treasury and used for legitimate corporate purposes, and the transaction turns out to be void, leaving such other with no consideration for his money, the law implies a promise by the corporation to repay the same, which promise may be enforced by action; that a public corporation cannot, under such circumstances, retain the money and invoke the doctrine of *ultra vires* to defend its position, its rights in that regard, in the situation suggested, being no greater than those of a private corporation. That rules this case so clearly that discussion of the matter cannot make it more plain. The liability to restore the money in such a case does not necessarily rest on the doctrine of relief from mutual mistake of fact, or mistake on one side and fraud on the other. It is grounded on the broad doctrine of natural justice, that where, in a transaction not prohibited by law or involving moral turpitude, a county or other public corporation obtains the property of another without authority of law and uses the same in lieu of moneys obtained or that otherwise would have to be procured by legitimate taxation, the person from whom the same was received not obtaining any consideration therefor, the money should be restored.

Marsh v. Fulton Co. 10 Wall. 676. That doctrine is stated in Green's Brice, Ultra Vires, 623, as follows:

"Persons who have in any way advanced money to a corporation, which money has been devoted to the necessaries of the corporation, are considered in chancery [and also, it would seem to follow, in an equitable action for money had and received] as creditors of the corporation to the extent the loan has been expended."

To support that the author refers to many cases where corporations, without authority, obtained money from private persons upon ostensibly valid contracts, which were in fact wholly void, and the corporations were held liable to account therefor so far as the proof showed that the money had been expended for legitimate corporate objects.

3. Did the court err in allowing interest from the time the money was paid to the county clerk? That must be answered in the affirmative. The cause of action, as we have seen, does not date from the time the money was paid to the county clerk, but from the time it was used by the county for public purposes. The county was not responsible for the mere error of its clerk in receiving the money. *Gilbert v. Pier,* 102 Wis. 334. Its liability was created by using plaintiffs' money as public funds. It was not then liable absolutely, because there was no way of knowing that respondents would ever treat the transaction upon which the money was paid as rescinded. They did not do so and ask for the return of the money till August 2, 1892. The circumstances were such that some affirmative act on their part was necessary to put the county in the wrong and start the interest period running. This case is entirely unlike *United States v. Sanborn,* 135 U. S. 271, 10 Sup. Ct. 812, and *Redfield v. Ystalyfera I. Co.* 110 U. S. 174, 3 Sup. Ct. 570, and other cases cited by counsel for respondents, where the party required to restore was held to be in the wrong from the time the money was received, and interest from that time was allowed as damages,

except as such right was deemed affected by laches on the part of the claimant. Here the county was not guilty of any wrong till it refused to pay the money to respondents when they demanded it. This case is like *Louisiana v. Wood,* 102 U. S. 294. The facts there were these: There was power to borrow money and issue bonds. It was so defectively executed that the bonds issued were void. The holder thereof was held entitled to recover the money parted with therefor, it appearing that the corporation had enjoyed the benefit of the same as public money, expending it for its legitimate purposes, and to recover interest thereon at the legal rate from the time the obligation to restore the same was denied.

4. Is appellant entitled to credit, on the respondents' demand, for the money received by the latter in dealing with the apparent title made to them by the void deeds? That question, it seems, must be resolved in favor of appellant. The responsibility to restore, as we have seen, in cases of this kind, rests wholly on the doctrine of equity. That goes no further than to protect the party against loss of his money, parted with by him in good faith and paid into the county treasury without any benefit moving from the county to him, upon his restoring the corporation to its former position,—not necessarily upon condition of a full restoration in that regard, but so far as equitable rules require. If a person parts with his money to a municipal corporation for invalid bonds, and uses his apparent ownership of good obligations by selling the same to another as valid securities, his cause of action, if he has one, by equitable assignment passes with the ownership of the paper, leaving no cause of action in him for a restoration of his money by the municipality, until something thereafter occurs to his damage. The vendee of the paper, under those circumstances, is held to be the owner of the right to demand a return of the consideration paid to the corporation therefor. *Louisiana v. Wood, supra.* If plaintiffs in this case, after receiving the void deeds from the

county, had transferred their claim of title to all the lands to a third person by quitclaim deed, receiving the full amount which they paid to the county, obviously their equitable right to demand repayment of the money from the county would have passed to their grantee. They would have no equitable ground of action therefor against the corporation thereafter, because of their having used their position under the void deeds to their benefit, to the extent of the full amount of the money paid to acquire it. One of the essential elements of liability in a case like this would then have been entirely lacking: failure of consideration. What would have been true in case of a sale of plaintiffs' claim of title to all the lands must be true *pro tanto* so far as they used such claim to their benefit. To that extent they parted with their right to demand reimbursement from the county. They incapacitated themselves from enforcing such demand because of their inability to restore the county to its former situation. It was held in *Gates v. Parmly,* 113 Wis. 147, 87 N. W. 1096, that a person cannot recover the purchase money of land, paid on an executory contract, upon the ground of failure of consideration, after parting with the claim of title he obtained for such money so as to be unable to return it to his vendor, even though such claim be entirely void.

We do not overlook the holding in *Paul v. Kenosha,* 22 Wis. 266, to the effect that it is not necessary to return worthless paper as a condition of maintaining an action to recover the consideration parted with therefor. That does not go so far as to hold that there can be a recovery and the void paper be left outstanding in the hands of third persons. In that case the paper was actually brought into court, canceled, and made a part of the record. Under those circumstances it was said that plaintiff could recover. The learned counsel for respondents in this case recognized the obligation to restore to the county the shadow of title obtained by respondents under their void deeds. They tendered to the county, as we have

seen, at the time of making the claim for a restoration of the money, a quitclaim deed in form retransferring the lands. That was ineffectual as regards the lands which were in form transferred by respondents to third persons. *Gates v. Parmly, supra.* So far as the record shows, there is no liability on the part of respondents to their grantees. If they are not here charged with the money which they obtained by dealing with the claim of title they possessed under the void deeds, they will make a clear profit, out of their transaction with the county, of $3,566 and interest thereon. The doctrine of equity upon which they rely does not go that far. It may be invoked by respondents to make them whole, so far as appellant used their money for its legitimate public purposes. Beyond that the equities are in favor of the county. Respondents used their position under the void deeds, as before indicated, to their gain. Whatever title the county had to the lands thereby became, and so far as appears remains, clouded by the conveyances to those from whom such gains were received. Plaintiffs, in order to recover, were bound to maintain that they suffered loss to the profit of the county by parting with their money, receiving no consideration therefor. When it appeared, *prima facie*, that they were enabled to assert a claim of title to the lands by reason of the formal conveyance thereof to them, so as to obtain the sum of $3,566, they should have taken up the burden of showing an equitable right to a full recovery notwithstanding such fact. How they could have carried that burden successfully under the circumstances, we need not inquire. It is sufficient for the purposes of this case to say that they made no effort to do so.

Bickford v. Page, 2 Mass. 455, upon which counsel rely to support their claim for a full recovery, does not touch this case. That was an action for breach of a covenant of seisin and good right to convey, which was said not to run with the land, by the common law, because a mere personal claim or chose in action is not assignable. That rule has ceased to be

universal since such claims have become assignable. *Kimball v. Bryant,* 25 Minn. 496; *Mecklem v. Blake,* 22 Wis. 495; *Noonan v. Ilsley,* 21 Wis. 138; Pingrey, Real Prop. § 1429. The decision was grounded wholly on the nonassignability of choses in action and the rigorous common-law rule as to the measure of damages for a breach of covenant of seisin and good right to convey. It will be seen at once that the rule must be very different where the right to recover rests wholly upon doctrines of equity.

5. Did the court err in overruling the motion to set aside the judgment and grant a new trial upon the ground of newly discovered evidence? On that it seems that respondents must prevail, if for no other reason, because, if all the newly discovered evidence had been produced and considered upon the trial, it could not have changed the result. The pendency of an action previously commenced on the same cause of action in the federal court, if such was the situation, did not prevent proceeding to judgment in the state court. Again, what the county clerk said at the time plaintiffs paid the money to him, and the fact, if it is a fact, that they relied wholly on his computations in determining whether the amount paid was sufficient to authorize him to make the deeds, are wholly immaterial to their right to recover. They paid their money in good faith. The consideration therefor entirely failed as between them and the county. The latter had the full benefit of the money for public purposes. The mere shadow of title obtained for the money has been transferred to the county, except so far as it was used to obtain the $3,566 to which we have referred. Admit that the clerk informed respondents that in the event the deeds he delivered to them should be held void they could not recover their money, and admit that they were parties to the mistake in computing the amount of money required to be paid in order to authorize the clerk to convey the county's interest in the lands,—that

does not militate at all against their right to recover of the county upon the grounds of equity we have discussed.

The result of the foregoing is that respondents' legitimate claim against appellant on August 2, 1892, when the demand for a restoration of the money was made, was $13,499. They are entitled to recover that sum with legal interest from August 2, 1892, and the costs as heretofore taxed in the circuit court, and no more. The case having been submitted to the trial court for decision at the close of the evidence, it should be remanded upon reversal here for the rendition of the proper judgment.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment as indicated in the opinion.

ISAACS, Appellant, vs. BARDON, Respondent.

March 13—April 1, 1902.

Vendor and purchaser: Reasonable time for recording plat: Rescission: Interest: Laches.

1. A contract for the sale of certain lots "in B.'s division of Ashland" acknowledged payment of the whole purchase price except $1, which was to be paid "when the deed is executed and delivered." The vendor covenanted to convey the premises on demand after the payment of the $1. The contract recited that the plat of the land had not been recorded, and stated that "it is the purpose of this contract that it be a bond for a deed to be executed . . . whenever said plat is recorded." The purchaser was in possession under a prior contract, and had made improvements. *Held*, that there was reserved to the vendor only a reasonable time within which he should not be compelled to record the plat and convey the lots according to it, and that after nine years plaintiff's right to such conveyance was absolute.
2. Where, in such case, after lapse of nine years the vendor refused upon demand to record the plat or to execute a deed, and at the

trial declared that he would not convey otherwise than by metes and bounds, the purchaser was entitled to an absolute rescission of the contract, and to recover back that which he had paid, together with the value of his improvements, with interest from the date of notice of his election to rescind.

3. In such a case plaintiff was under no duty to act until he was notified of some denial of his rights by defendant, and his failure to do so for nine years, during which time he was in quiet possession and the vendor's position was in no wise changed, was not laches.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

In July, 1887, during a speculative boom in the city of Ashland, the plaintiff, a resident of Madison, purchased from the defendant, a large owner of property in Ashland, property described as lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 in block 11 of *Bardon's* division of Ashland, "which plat is not yet of record"; paying $300 down, and taking land contract containing that description. That plat covered 160 acres of land southeasterly of the settled part of Ashland. Plaintiff having completed his payments of $2,000, he in February, 1890, accepted, at the request of the defendant, a bond for a deed, instead of a deed, which bond was in the ordinary form of land contract, certifying sale at the price of $2,000 of the same described lots, acknowledging payment of $1,999, and obligation to pay the remaining $1 upon delivery of deed; also reciting that the said plat was then not recorded yet, and containing the clause, "It is the purpose of this contract that it be a bond for a deed to be executed by said *Bardon,* or his legal representatives or heirs, whenever said plat is recorded." The covenant of the defendant, as party of the first part, was to convey the described premises on demand after payment of the remaining $1. The plaintiff, during pendency of the first contract, cleared the stumps out of the lots at an expense of $52.50, built two houses thereon at a cost of about $1,000, and collected rents therefrom until 1899, without any demand

on the part of the defendant to complete the purchase, nor on the part of the plaintiff to make conveyance.

In 1897 the plaintiff received some not very definite information that the idea of recording any plat had been abandoned by the defendant, and made inquiry and protest by letter, defendant's reply to which is not in evidence. It appears as a fact that the defendant had fenced off nearly the whole of the proposed plat, cleared the stumps therefrom, and rented the same as a farm, leaving unfenced a street giving access to plaintiff's lots. In September, 1899, the plaintiff caused to be served on the defendant a written communication stating that he had desired for a long time that the defendant comply with the agreement made in July, 1887, and that of February 7, 1890; that the failure to record the plat and make a deed had caused him much damage and inconvenience,—and making formal demand that defendant forthwith record the division plat mentioned in said agreements, and that he forthwith make a deed; also tendering him the remaining $1 of the purchase price. In February, 1900, Mr. McCloud, as attorney for the plaintiff, made a further personal demand upon the defendant that he have the plat of *Bardon's* division to Ashland recorded, and give plaintiff a deed of the lots described in his agreement, and tendered him again the $1. His testimony is that *Mr. Bardon* said he would not record the plat or give a deed.

Thereafter, on December 1, 1900, Mr. McCloud, an attorney for the plaintiff, notified *Bardon,* by delivering to him a written notice, that the plaintiff rescinded the contract for purchase, and then and there tendered back to him a release deed from the plaintiff of all interest therein, and demanded payment of the moneys paid for the lots, with interest from date of payment, and the amount of improvements that had been made. Plaintiff also did all that he could to surrender possession of the lots to the defendant, and since then has exercised no possession or control over them. This demand was

refused, and the present action brought to recover the moneys paid by plaintiff in purchase of the lots, with interest, and the value of the improvements placed thereon, with interest on the same from the time of making them, less the net rents received by plaintiff above costs of collection, repair, and taxes.

At the trial defendant persisted in determination not to record plat or to convey otherwise than by metes and bounds. The court denied the motion to direct a verdict in favor of the plaintiff, and directed a verdict in favor of the defendant, whereon judgment for the defendant was entered, from which the plaintiff appeals.

For the appellant there was a brief by *Geo. H. McCloud,* attorney, and *A. W. Sanborn,* of counsel, and oral argument by *Mr. Sanborn.* They argued, among other things, that the contract contains an express agreement or covenant to record the plat. There is nothing unexpressed except the time. The law presumes a reasonable time. No particular form of words is necessary to constitute a covenant. 8 Am. & Eng. Ency. of Law (2d ed.), 55; *Johnson v. Hollensworth,* 48 Mich. 140; *Marshall v. Craig,* 1 Bibb (Ky.), 379. Several covenants may be embodied in a single sentence or a single promise. *Johnson v. Hollensworth,* 48 Mich. 140; *Matteson v. Scofield,* 27 Wis. 671. It was the duty of the defendant to record the plat *without a demand,* before plaintiff could be required to demand a deed. If the delay on the part of the plaintiff has been caused by the act of the defendant, the latter cannot plead the plaintiff's laches as a bar to the suit. 18 Am. & Eng. Ency. of Law (2d ed.), 111; *Callender v. Colegrove,* 17 Conn. 1; *Ditto v. Harding,* 73 Ill. 117. So long as the relative positions of the parties are not altered to defendant's prejudice, delay is of very little consequence. 18 Am. & Eng. Ency. of Law (2d ed.), 101; *Nudd v. Powers,* 136 Mass. 273; *Stewart v. Stewart,* 83 Wis. 364, 372;

Coryell v. Klehm, 157 Ill. 462; *Wahl v. Zoelck,* 178 Ill. 158; 18 Am. & Eng. Ency. of Law (2d ed.), 119, 120; *Fawcett v. Fawcett,* 85 Wis. 332–336. Laches will not be imputed to one in peaceable possession of property for delay in resorting to the courts to establish his legal title. 18 Am. & Eng. Ency. of Law (2d ed.), 125; *Farmers' & M. Bank v. Detroit,* 12 Mich. 445.

For the respondent there was a brief by *Tomkins & Tomkins,* and oral argument by *W. M. Tomkins* and *R. Sleight.* They contended, *inter alia,* if there was an implied contract it was to record the plat when the circumstances were such as to warrant it. The undisputed evidence shows that the plaintiff bought the lots in question during the time of the notorious Ashland boom, when it was believed by both parties that there would be a great demand for lots in the Bardon division. The boom subsided and from that day to this there has been no sale for lots in that locality. It would seem that the parties in this case had purposely left out any promise to record the plat, for the reason that it was uncertain when the conditions would be such as to warrant it. No covenant will be implied when purposely withheld. *Bruce v. Fulton Nat. Bank,* 79 N. Y. 154. The laches which defendant claims should estop plaintiff from recovering in this action, is not so much laches as the acquiescence in, or placing the same construction as defendant upon, an implied promise, if such there was, that the plat should be recorded when the exigencies of the case demanded it and not before.

DODGE, J. The rights of the parties must depend upon the second contract, made in February, 1890; for, whatever may have been their respective rights and duties prior to that time, they voluntarily entered into that agreement to control for the future. That instrument recognizes the purchase by the plaintiff of certain specified lots upon a plat, and the payment of the full purchase price therefor, except $1, and con-

tains an absolute covenant on the part of the defendant that, in case the remaining $1 of purchase price be paid "at the times and in the manner above specified, he will, on demand, thereafter cause to be executed and delivered to the said party of the second part, or his legal representatives, a good and sufficient deed, in fee simple, of the premises above described." The time of payment of this $1 was to be "when the deed is executed and delivered." From these two provisions it cannot be doubted that the plaintiff would have been entitled to his deed at any time when he demanded the same; the $1 payment being, of course, merely formal, but yet a condition which he must perform. The document evidenced the fact that the whole equitable title had passed to the plaintiff, and that a conveyance was to be at his option. This clear obligation is modified by the interpolation of the clause, "It is the purpose of this contract that it be a bond for a deed to be executed by said *Bardon,* or his legal representatives or heirs, whenever said plat is recorded." It is inconceivable, however, that the parties, after the sale by one of certain premises, and the full payment therefor by the other, accompanied by possession and improvements thereon, could have intended that the plaintiff's legal title, necessary to enable him to sell the lots, should be indefinitely postponed, and his rights as an owner placed wholly at the discretion and option of the other party. There being some measure of ambiguity as to the extent to which the absolute undertaking by defendant to convey upon demand is modified by the clause last quoted, the situation occupied by the parties in February, 1890, at the time of making this agreement, is of some materiality. That position is quite clearly disclosed. It involved a purchase some two or three years before, at a time when both parties anticipated great development of the city of Ashland, of certain lots upon a plat covering an entire quarter section of land belonging to the defendant. The correspondence between the parties makes perfectly obvious the fact that the purchase was a

speculative one, with a view to selling again; also that the plaintiff, with the knowledge, and indeed to some extent with the co-operation, of the defendant, had cleared up the lots and had built houses upon two of them. A letter of the defendant requesting plaintiff to accept the so-called bond for a deed, instead of the deed, indicates as a reason therefor defendant's desire to temporarily withhold his plat from record. As a result of all these considerations, we cannot doubt that the force of the last-quoted clause in that agreement was to temporarily postpone the acknowledged right of the plaintiff to immediate conveyance of the premises as lots upon a recorded plat, and that both parties had assented to that measure of modification of the otherwise complete right of the plaintiff to his deed. But the contract does not define the period of that limitation. It leaves it wholly indefinite. The construction must be, therefore, either that it rested with the defendant, *Bardon,* absolutely and wholly, so that, if he saw fit never to record the plat, the plaintiff would never be entitled to a deed of the lots for which he had paid, or it must be deemed to have been subject to the limitation which the law customarily fixes upon agreements where the time of performance is not specified by the parties, namely, that a reasonable time is allowed therefor, unless, indeed, it should be treated as vesting the option in the plaintiff to terminate the delay at his will by demand. The first construction, whereby the plaintiff might never acquire the legal title to the premises he had purchased and paid for, we cannot entertain as expressing the intention in the mind of either party; assuming, as we must, that they were rational men and that the contract was intended to accomplish some purpose. Abandoning that construction as impossible, the most favorable one to the defendant is that he had reserved to himself a reasonable time within which he should not be compelled by the demand of the plaintiff to legally record his plat and to convey the lots according to it. It is quite unnecessary to discuss how short

a time might satisfy this idea, under all the circumstances, for the plaintiff allowed more than nine years to elapse; and it is too plain for discussion that parties could not have contemplated as a reasonable time for the suspension of this purchaser's legal title a longer period than that.

If, then, as seems to us unavoidable, it be determined that the reasonable time accorded the defendant to record his plat had elapsed, we have only the other element of the contract, unembarrassed by that qualification, namely, the absolute agreement of *Bardon* to make a good and sufficient deed upon plaintiff's demand. This he categorically refused, according to the undisputed testimony of McCloud; and we can discover no escape from the conclusion that the contract was wholly broken at that time, and plaintiff informed that, notwithstanding his payment for the lots, the defendant would not convey them to him; that the consideration for which his money had been paid had, by the wrongful act of the defendant, failed. No plainer case for the exercise of the right of rescission can be presented. Plaintiff might, it is true, have sued for his damages. Whether he might also have maintained an action for specific performance, involving, as it did, an act on the part of *Bardon* in acknowledging and recording his plat, which, perhaps, a court of equity could not perform in the event of his refusal, is a question we need not decide. Certain limitations on the efficacy of such a proceeding are discussed in *Park v. M., St. P. & S. S. M. R. Co., post,* p. 347, 89 N. W. 532. True, courts are not swift to enforce absolute rescission of contracts for breaches of their terms not going to the whole consideration thereof, but in this case there was not only the technical refusal of the defendant to make a deed when demanded, but there was upon the trial his declaration that he never would convey the lots according to the plat contemplated at the time of contracting. True, he only declared negatively that he would not record the plat, but he made no suggestion that he was willing to convey other than

by metes and bounds. This we cannot consider in any respect a compliance with the contract of purchase and sale which had been made. The conveyance of specified lots according to a certain plat would have given to the plaintiff important and valuable rights, such as would not accompany a deed made without reference to that plat. *Donohoo v. Murray,* 62 Wis. 100, 22 N. W. 167; *McFarland v. Lindekugel,* 107 Wis. 474, 83 N. W. 757. It was therefore entirely plain that *Bardon* refused to convey to the plaintiff that for which he had paid his money, from which arose his right to recover back that which he had paid, and also the amount to which he had enhanced the value of the premises by building thereon or otherwise improving them in reliance upon defendant's agreement to convey to him, with interest, however, only from the date of notice of rescission. *Rice v. Ashland Co., ante,* p. 130, 89 N. W. 908.

Apparently the court below escaped this conclusion, partly at least, on the ground of plaintiff's laches. To this view we cannot subscribe. Plaintiff was under no duty to act until he was informed of some denial of his rights by defendant. During all the period from 1890 to 1899 he was justified in the supposition that *Bardon* still intended to record the plat, and not until September, 1899, did he receive any intimation to the contrary. Up to that time he supposed he was accommodating defendant's convenience. After that information he acted with due diligence, for within a little more than a year he exercised his election to rescind, notified defendant, and brought suit. Meanwhile defendant's position was in no wise changed. There are here no facts on which to impute laches. Plaintiff was clearly entitled to recover such sum as the evidence justified, and the trial court should so have instructed the jury. Direction of verdict for defendant was error.

By the Court.—Judgment reversed, and cause remanded for a new trial.

SMITH and another, Respondents, vs. WISCONSIN INVESTMENT COMPANY, Appellant.

March 14—April 1, 1902.

Replevin: Pleading: Right of possession: Sale of lumber: When title passes: Lien for advances.

1. A complaint in replevin stating that plaintiff is the owner of the property and entitled to its possession, and that defendant has wrongfully taken and unlawfully detains the same, is sufficient, although it does not allege that plaintiff is entitled to the "immediate possession."
2. A contract for the sale of lumber to be sawed thereafter provided that it should be piled at the vendor's mill as directed by the vendees; that when in shipping condition it should be delivered on cars a mile and a half from vendor's mill, and should be graded, scaled, and accepted when loaded on the cars; and that the value should be credited on indorsements which the vendees were to make for the vendor. All culls in excess of a certain percentage were to be rejected, and the vendor was to hold the lumber free from liens and to pay the taxes. As security for the indorsements to be made by the vendees, the title and right to possession were to vest in them, the piles were to be marked with their initials, and they were to insure the lumber at the expense of the vendor. If the lumber was not all shipped before the end of the year, the vendees were to scale and accept it, or make an approximate estimate, and make final settlement. *Held*, that the title to the lumber did not pass to the vendees until it was delivered, passed upon, and accepted by them.
3. The vendees in such case did not make any indorsements as provided for in the contract, but advanced money to the vendor, taking his note. The lumber was not piled and marked as contemplated in case of indorsements, nor insured by the vendees. *Held*, that the contract gave no lien on the undelivered lumber for such advancements, and that the vendees could not claim it as against a mortgagee of the vendor.
4. An attempt by the vendees to take possession, by marking the piles of lumber in the absence of vendor and after he had mortgaged the same, gave the vendees no title and no right to maintain replevin against the mortgagee, whether his mortgage was or was not valid.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Replevin of a lot of lumber located at Copper Falls, Ashland county, Wisconsin. The plaintiffs claim to be the owners of the lumber by virtue of a certain contract made with one E. H. Wicks. The latter was the lessee of a sawmill at Copper Falls. During the season of 1899 and 1900 he had put in a quantity of basswood and hemlock logs to be sawed at his mill. Prior to March 19, 1900, he had had some negotiations with plaintiffs as to the sale of the lumber to be cut from his logs. On that day he wrote plaintiffs a letter as follows:

"I inclose you the contract between you and Connor & Krause, of Marshfield, Wisconsin, dated Jan. 9th, 1900, the same being the sale of your hardwood lumber for the coming season; and, as to our agreement, I sell you my lumber, basswood and hardwood, under the same contract, or one in duplicate of it, being worded the same; or, to make it more plain, the Connor & Krause contract is the contract between Smith & Osborn and myself for my hardwood lumber, basswood," etc.

The contract referred to in the letter between Connor & Krause and plaintiffs is quite lengthy, and in substance is as follows: Plaintiffs sell and agree to deliver on cars their entire cut of lumber from certain logs at their mill at Park Falls, with the exception of 500,000 feet of basswood. The lumber was to be cut as the vendees directed, and piled as stipulated. Connor & Krause were to accept, scale, and grade the lumber as it was loaded on the cars, and pay stated prices, mill culls and hearts out. Plaintiffs guarantied the stock should not contain to exceed twenty-five per cent. of shipping culls, and that the balance of the stock should be of a grade of common and better. If there was a larger percentage of shipping culls than stated, they were to be rejected. The sellers were to hold the stock free from liens and pay the taxes. The contract then contained the following clause:

"For the purpose of assisting the party of the first part in the purchase of logs during the coming winter, party of the

second part agree that they will assist the party of the first part in securing money to purchase logs, etc., by indorsing for them; and, in order that the party of the second part may be secured for such indorsements, it is hereby agreed and understood that the right of possession and title to said logs shall be vested in the party of the second part, wherever found. It is also agreed that the party of the second part shall insure said lumber to secure themselves against loss by fire for any indorsements that they may have made, charging against said party of the first part the cost of such insurance. And when said lumber is manufactured and in piles, each pile shall be numbered and marked with the initials of the party of the second part. When the said stock is in shipping condition, the said party of the second part agrees that they will take out said lumber from time to time, and for all shipments that are taken out during any month they will, at the end of said month, credit the proceeds of said shipment, less two per cent. discount for cash, to the account of the party of the first part, applying same to their indorsed paper."

It then contained some stipulation as to scaling up and accepting all that was not shipped by the end of the year 1900, and an agreement by the vendees to assist the other parties by their indorsements to an amount equal to sixty per cent. of the value of the lumber as it was being manufactured.

On March 24, 1900, plaintiffs gave Wicks a check for $2,000, and charged it to him on their books. At the same time they took Wicks's note for that amount, bearing interest, and thereafter discounted it at the bank, where it was at the time of the trial, unpaid. On October 1, 1900, they gave Wicks $150. During August and September Wicks delivered them lumber of the net value of $751.44. At some later date the plaintiffs received lumber of the net value of $661.84. After charging up interest and certain discounts, the plaintiffs claimed a balance due them from Wicks of $886.56. On October 1, 1900, Wicks was indebted on a note of $1,000 to the Ashland National Bank, then due. On that day he took up the old note and executed a new one, due on demand, and

gave the bank a chattel mortgage covering all the lumber at his mill to secure the same. This mortgage was afterwards assigned to defendant, and under it the company took possession of the lumber.

Plaintiffs brought this action of replevin, alleging ownership, right to the possession, and an unlawful taking and detention by defendant. The defendant denied plaintiffs' title, and alleged that the lumber had been seized under some half dozen writs of attachment against Wicks, and that defendant had taken possession of the lumber under its mortgage, subject to the rights of the officer making the attachments.

Upon the trial the plaintiffs proved their contract, the payment to Wicks as stated, the receipt of a portion of the lumber, that Wicks had left the state, and that about October 15th plaintiffs had marked the remaining piles of lumber with their initials. A motion for a nonsuit was denied. The defendant showed the giving of the mortgage by Wicks and its assignment; that Wicks's lease of the mill did not expire until 1901; that Wicks insured the lumber as his own to the amount of $5,000; that some of the policies were payable to the Ashland National Bank in case of loss; that Wicks gave mortgages and bills of sale of the lumber to various parties; and that the lumber, prior to October 1st, was not marked, except with Wicks's own mark. Defendant also introduced the records in the several attachment cases.

Each party moved for a direction of a verdict. The court granted plaintiffs' motion except upon the question of the value of the property, which was found by the jury. Defendant excepted to the ruling and to the refusal to direct a verdict for defendant. Plaintiffs elected to take judgment for the value of the property. Defendant appeals from the judgment.

For the appellant there were briefs by *Dufur & Alvord*, and oral argument by *John F. Dufur*.

For the respondents there was a brief by *H. C. Peters*, attorney, and *R. Sleight*, of counsel, and oral argument by *Mr. Sleight*.

BARDEEN, J. A preliminary question arises over the sufficiency of the complaint. It is alleged that plaintiffs are the owners and lawfully entitled to the possession of the property described, stating its nature; that defendant wrongfully took possession of and unlawfully detained the same, to plaintiffs' damage. Then follows an allegation of demand and refusal to deliver possession. The criticism is that it is not alleged that plaintiffs are entitled to the *immediate* possession of the property. It is true that there may be instances when the general property may be in one person and the right to immediate possession in another. But when the complaint states that the plaintiff is the owner and entitled to the possession, and that defendant has wrongfully taken and unlawfully detains the property in question, there is no room for any inference of divided ownership and right to possession. See *Oleson v. Merrill*, 20 Wis. 462, which sustains a complaint much less definite in allegation than the one under consideration. It is not unreasonable to assume that where one says that he is the owner of property and entitled to the possession of the same, he is entitled to the *immediate* possession. Any inference that might arise as to the defendant's right of possession is negatived by the allegations of wrongful taking and detention. The statute of Kansas, and probably of other states, requires that the plaintiff shall state that he is entitled to the "immediate possession" of the property sought. *Paul v. Hodges*, 26 Kan. 225. No such provision is in our statute, that we are aware of.

The only question submitted to the jury in this case was as to the value of the property in controversy. The trial court determined the disputed question of title to the lumber in favor of plaintiffs. This can only be justified on the theory

that the title passed under the contract set out in the statement. The question of when title passes under contracts of sale is one not always easy of solution. Very much depends upon the wording of the contract, situation of the property, and the intention of the parties. The chief difficulty in this case arises in the attempt of the parties to adopt the terms of the Connor & Krause contract as their contract. The evidence shows that the situation of the vendors in the two contracts was quite different. Under the Connor & Krause contract the vendees were to assist the vendors by indorsements for the purpose of purchasing logs. Under the contract in suit no such project was in mind. Wicks already had his logs purchased, and the greater portion of them had been delivered at the mill when the contract was made. There were other points of dissimilarity in the situation of the parties not important in this litigation.

The plaintiffs argue that the contract has a twofold aspect, either of which will sustain the position of the trial court. In the first place, they claim that the contract shows an executed sale of the lumber, the title to which became vested in plaintiffs before this action was commenced. No such conclusion is warranted by the literal terms of the contract. The lumber was not in existence at the time the contract was made. It was to be sawed during the ensuing sawing season. It was to be piled at the sawmill, a mile and a half from place of delivery. It was to be delivered on board cars, and to be graded, scaled, and accepted when loaded on cars, and the value was to be credited on indorsements at the end of each month upon the basis of the inspection made when loaded. Wicks was to hold the lumber free from liens and to pay taxes on the same. Plaintiffs were to assist Wicks in securing money by indorsements, and the title and right of possession was to vest in them as security. Plaintiffs were to insure the lumber, and charge the cost to Wicks. In case the lumber was not all shipped out before the end of the year

1900, the plaintiffs were to scale and accept the stock, less the cost of loading on cars, or make an approximate estimate if it could be agreed upon, and make final settlement. It is perfectly evident that title did not pass at the date of the contract. The whole theory of the contract is inconsistent with that idea. The fact that plaintiffs were to have title and possession as security for indorsements is wholly unreconcilable with the idea that absolute title had become vested in them. A party does not usually take security on his own property. But stronger than this is the fact that the contract plainly contemplates the scaling, grading, delivery, and acceptance of the lumber by plaintiffs before the title should pass. The lumber was to be up to a specified grade, and to contain not to exceed twenty-five per cent. of shipping culls. That grade and the quantity of culls could only be determined by inspection, and all culls exceeding the limit specified were to be rejected and remain the property of Wicks. On the face of the contract, therefore, we say no title to the lumber passed until it was delivered, passed upon, and accepted by the plaintiffs.

We are strengthened in this conclusion by the acts of the parties. Wicks treated the lumber as his own by insuring it and mortgaging it to other parties. Plaintiffs, instead of indorsing for Wicks, as contemplated by the contract, on March 24th gave him a check for $2,000, and charged it to him on their books. On its face this would look like an advance on the sale price of the lumber. But the fact appears that at the same time they took his note for the amount of the check, bearing interest, and later discounted it at the bank, where it was, unpaid, at the time of the trial. In one aspect the transaction was a payment on the lumber, and in another a mere loan. Plaintiffs' agent who conducted the transaction considered it an advancement, and under that theory the other aspect of the transaction advanced by plaintiffs—that the contract may be construed to be a mortgage—falls to the

ground. Plaintiffs have not brought themselves within the clause of the contract which would give them a lien on the lumber for indorsements. The lumber was not piled and marked as contemplated in the contract in case indorsements were made. Plaintiffs did not insure the lumber as they were empowered to do under certain contingencies. They made no indorsements and assumed no liability to others on behalf of Wicks. The transaction mentioned is clearly not within the terms of the agreement. The contract fails to make any provision for a lien for advancements or for loans, and, none having been created by the act or agreement of the parties, the plaintiffs' claim of a mortgage interest is entirely without foundation.

Whatever view we take of the situation, we are unable to find any solid ground to support the court's conclusion. There was no delivery of the lumber after it was sold. The attempt of plaintiffs to take possession during Wicks's absence did not help their claim. They got no title by committing a trespass. They must stand upon their contract as the basis of their rights. Had there been a voluntary delivery of the lumber by Wicks to them, then the validity of defendant's mortgage might come in question. But, not having shown any title or right to possession in themselves, the plaintiffs cannot maintain this action, whether defendant has or has not title.

The principles of law applicable to the situation here presented have been considered in cases too numerous to be cited. The question whether a sale is completed or only executory, when no question arises under the statute of frauds and the rights of creditors do not intervene, is one to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale.

"When the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not abso-

lutely essential there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined. These are circumstances indicating intent, but are not conclusive." *Lingham v. Eggleston,* 27 Mich. 324.

But when anything is to be done by the vendor, or by mutual concurrence of both parties, for ascertaining the price of the goods,—as by weighing, testing, or measuring them,—or, the goods and the price being ascertained, there is something to indicate an intention to postpone the transference of the property till the fulfilment of any specified conditions, the performance of these conditions is presumed to be a condition precedent to a transfer of the property. These conditions may be weighing, measuring, testing, inspecting, delivery, acceptance, or any other deemed necessary by the parties to the identification and severance of the thing sold. One of the tests of the question of title is who should bear the loss in case the property were destroyed. A few of the many cases where the question here involved has been under discussion are here cited: *Sanborn v. Hunt,* 10 Wis. 436; *Galloway v. Week,* 54 Wis. 604, 12 N. W. 10; *Pike v. Vaughn,* 39 Wis. 499; *Thomas v. Tolford,* 70 Wis. 155, 35 N. W. 293; *Lingham v. Eggleston,* 27 Mich. 324; *Hahn v. Fredericks,* 30 Mich. 223. We do not think the transaction in this case amounted to a completed sale, or was attended by any such legal consequence.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial.

ECKERT, Plaintiff in error, vs. THE STATE, Defendant in error.

March 14—April 1, 1902.

Insanity: Instructions to jury: Homicide: Degree: Evidence.

1. Upon the trial of a special issue of insanity, it was not error to refuse an instruction to the effect that the verdict should be not guilty if the killing was the offspring or product of mental disease in the defendant, and to make predominant the idea that if the defendant, at the time of the homicide, had sufficient mind to know right from wrong and to understand the nature and quality of the act he was committing, then he was sane, in law.
2. Defendant's testimony that during a violent quarrel with his wife, after threatening to kill him, she assaulted him with a razor, whereupon he seized a revolver in the drawer of a washstand and shot her twice, is *held* to sustain a conviction of murder in the second degree; and although the theory of the prosecution was that he deliberately shot his wife while she was asleep, defendant cannot object to a verdict based upon the supposed truthfulness of his own testimony.

ERROR to review a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

For the plaintiff in error the cause was submitted on the brief of *C. E. Armin.* He contended, *inter alia,* that the definition of legal insanity which has been adopted in this state is so far outgrown and so antiquated, in view of the progress in modern psychiatry, that another and more scientific definition should be laid down, and that it was error in the court, upon the trial of this case, to refuse to give the charge requested by the defendant, that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be, 'Not guilty, by reason of insanity', if the killing was the offspring or product of mental disease in the defendant." *State v. Jones,* 9 Am. Rep. 242, 50 N. H. 369; 4 Am. Law Review, 236; 15 id.

726; Ray's Med. Jur. of Ins. sec. 44; Maudsley, Resp. in Ment. Dis. 104; 2 Hamilton, System of Legal Medicine, 177; Winslow, Obscure Diseases of the Brain, etc. 132; Spitzka, Manual of Insanity, 23.

For the defendant in error there was a brief by the *Attorney General,* and oral argument by *R. F. Hamilton,* second assistant attorney general.

CASSODAY, C. J. The plaintiff in error was convicted of murder in the second degree for having, about 5 o'clock on the morning of August 26, 1899, killed his wife by shooting her with a revolver. There were at the time two other persons occupying rooms in the upper part of the house,—an uncle of the deceased, by the name of Minor, and a boarder by the name of Young,—but neither of them witnessed the killing, both being asleep at the time; but it was admitted by *Eckert,* who soon thereafter went, in company with Young, and gave himself up to the sheriff. *Eckert* was a carpenter by trade, forty-four years of age, and had been married and lived with the woman he killed for twenty years, and had for some time previous to the killing suspected improper relations between his wife and one Turner. His counsel states the circumstances of the killing, to the effect that the day previous she went to the county fair with her uncle, Mr. Minor, who was visiting her; that about 5 o'clock in the afternoon Minor returned without her; that soon after *Eckert* saw his wife, in company with Turner, going from the fair grounds toward the business part of the city; and he immediately pursued them, and the three met in front of a saloon, where they had a stormy interview, and he then told Turner he was digging his own grave. The deceased insisted upon Turner going home with her, and he did; *Eckert* walking ahead and shedding tears. On reaching home, *Eckert* became quite violent in his language,—his wife taking part in the controversy,—until

Turner, accompanied by Minor, left the house and went down town. Mrs. Eckert then got supper, but *Mr. Eckert* refused to eat, and had taken no nourishment during the day. After supper he and his wife appeared to be reconciled, and went riding together, and while doing so met Turner; and his wife then insisted on *Eckert* making an apology to Turner for what he had said to him, but *Eckert* refused to do so. They returned home about 10 o'clock in the evening, and after *Eckert* had put out the horse he went into the house and found his wife, with her wraps on, engaged in writing. After Minor and Young had gone to bed, according to *Eckert's* testimony, which is uncontradicted, his wife finished her letter and directed it; and then, against his objection, she went out and down the street, as she said, to put the letter in the mail box, and did not return until 2 o'clock in the morning. He did not go to bed, and on her return they had a stormy interview, during which she threatened to cut his throat with a razor which she had secreted. When she went to bed she put the razor under her pillow, and he remained on the lounge, and from time to time protested against her conduct with Turner. Between 4 and 5 o'clock in the morning he went into the room, and up to the side of the bed, to make a last appeal to his wife to desist from going longer with Turner. She rebuked him with vile epithets, telling him that she loved Turner. He then threatened to commence proceedings for a divorce. She replied that he would never live to get a divorce; that she would cut his heart out,—and drew out the razor, whereupon he seized a revolver in the drawer of the washstand near the bed, and shot her twice,—first immediately back of the left ear,—leaving slight powder marks around the wound; and the second shot took effect in the cheek, and apparently had been fired from directly over her, and was badly powder-marked. The end of her thumb on her left hand had been shot away. When the two persons sleep-

ing upstairs got up, *Eckert* told them that he had shot his wife.

At the time of and before the commencement of the trial a special plea of insanity was interposed, with the plea of not guilty. The case appears to have been tried with care and deliberation upon both issues. The charge of the court on the issue of insanity covers a half dozen typewritten pages, and the request to charge on that issue covers nearly as many more pages. The gist of such requests is stated in the brief of counsel for the accused in these words:

"If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be, 'Not guilty, by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant."

In commenting upon the refusal of the court to give the instructions so requested, the same counsel aptly states:

"While the court injected into its charge nearly all of the requests of the defendant, they were so interwoven with the one dominating idea, viz., that if the defendant at the time of the homicide had sufficient mind to know right from wrong, and to understand the nature and quality of the act he was committing, that then he was sane in the law."

The charge of the court was fully justified, and in fact closely followed what was said by Mr. Justice DODGE, and held by this court, in the recent case of *Butler v. State,* 102 Wis. 364, 366, 367, 78 N. W. 590. It is in harmony with the rule stated by Chief Justice SHAW more than half a century ago, and which has been incorporated into the text-books and become elementary, as follows:

"A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing,—a knowledge and consciousness that the act he is doing is wrong and criminal and will subject him to punishment.

In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment,—such partial insanity is not sufficient to exempt him from responsibility for criminal acts." *Comm. v. Rogers,* 7 Met. 501, 502; 2 Greenl. Ev. (15th ed.), § 372.

We perceive no error in charging or refusing to charge the jury on the issue of insanity. The finding of the jury upon that issue is sustained by the evidence.

Counsel contends that the evidence is insufficient to convict the accused of murder in the second degree. The statute declares that "such killing, when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed or of any human being, shall be murder in the second degree." Sec. 4339, Stats. 1898. *Eckert's* version of what occurred at the time of the shooting, as stated above, is sufficient to support such conviction. In fact, counsel's contention seems to be based upon the theory of the prosecuting attorney on the trial, to the effect that *Eckert* deliberately shot his wife when she was sound asleep. But *Eckert* is in no position to object to a verdict based upon the supposed truthfulness of his own testimony as to his being threatened and assaulted by his wife with a razor, as mentioned in the above statement of facts. Such evidence brings the case within the recent rulings of this court. *Odette v. State,* 90 Wis. 258, 62 N. W. 1054; *Flynn v. State,* 97 Wis. 44, 72 N. W. 373; *Sullivan v. State,*

100 Wis. 283, 75 N. W. 956. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

MONTEITH, Plaintiff in error, vs. THE STATE, Defendant in error.

March 14—April 1, 1902.

Adultery: Evidence: Proof of handwriting.

1. The question being whether certain letters were written by defendant, one witness, who had seen defendant write a little, testified that he thought the letters were in defendant's handwriting, and another witness, a bank cashier, accustomed to examine handwriting, testified, after comparing the letters with an admittedly genuine signature of defendant, that in his opinion the same person wrote them all. *Held*, sufficient to warrant the admission of the letters in evidence, their genuineness being still a question for the jury.
2. Letters to a married woman written by defendant while in jail awaiting trial for adultery with her, referring to the good times they had had together, and couched in terms of affection such as could not properly be written to a married woman by one not her husband, were sufficient to indicate an improper intimacy between the writer and the recipient, and were admissible on the trial.
3. To sustain a conviction for adultery it is sufficient that the adulterous disposition be shown to exist between the parties, and that they were together in equivocal circumstances, such as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt beyond a reasonable doubt.

ERROR to review a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The plaintiff in error was convicted of the crime of adultery, and brings his writ of error to reverse the judgment. The crime was alleged to have been committed with one Sophia Olson, a married woman, on the 27th day of Febru-

ary, 1901, at the city of Superior. One Christ Olson, the husband of Sophia Olson, was the principal witness on the part of the state. His testimony tends to show that his wife was addicted to drinking; that he and his wife had had considerable domestic difficulty arising from her drinking, and from her associating with the defendant; that they at one time lived in the Chase Block in Superior, and rented one of their rooms to *Monteith;* that witness and his wife were living apart when the crime is said to have been committed, but that they had met and had some difficulty on that day; that the defendant was still occupying a room in the second story of the Chase Block at that time, and that on the evening in question the witness saw his wife go into the front entrance of the Chase Block; that he immediately went to the rear entrance, and reached the hall of the second story in time to see his wife enter defendant's room; that he stayed in the hall and watched for several hours, and saw defendant go down and get a can of beer, and take it into the room; that witness went away and returned early in the morning, and saw his wife and defendant come out of the room together, and that he followed them into the street, where he had a fight with the defendant. The testimony was undisputed that Sophia Olson occupied a room in the Chase Block that night, and that defendant engaged the room for her, and showed her to it. There is some testimony tending to show that it was a room adjoining defendant's room. A roommate of the defendant testifies that the defendant was in his own room in the evening, and stayed there all night; but his testimony was much shaken on cross-examination, and he admitted that he did not know when defendant went out of the room in the morning. There was also testimony by one witness to the effect that it was impossible to see the door of defendant's room from the point where Olson claims he stood and watched in the hall, on account of a jog in the wall of the hall; but it is clear that, even if the door itself was not ac-

tually in sight, people who came upstairs and went in the direction of the defendant's room could be seen until they reached a point within a very short distance of the door. Certain letters which the witness Olson testified that he procured from his wife were introduced in evidence, against objection and exception. Neither the defendant nor Mrs. Olson were sworn as witnesses.

A motion was made after verdict to set the same aside, and grant a new trial, because the verdict was against the evidence, but the motion was overruled and exception taken. No exceptions were taken to the charge, and the instructions requested by the defendant were all given.

For the plaintiff in error the cause was submitted on the brief of *A. C. Titus.*

For the defendant in error there was a brief by the *Attorney General,* and oral argument by *C. E. Buell,* first assistant attorney general.

WINSLOW, J. Two contentions are made by the defendant, viz.: (1) that the letters received in evidence were immaterial and not sufficiently identified as in the handwriting of the defendant, and (2) that the verdict is not sustained by the evidence.

1. The letters were quite long, and it is not deemed necessary to quote them here. They purport to have been written, one in April and one in May, after the alleged crime was committed, and when the defendant was in jail awaiting trial. They are addressed "Dear Friend," are signed with the initials R. M., and purport to be written from a place of confinement by one awaiting trial. They are couched in terms of great affection, and are such as could not properly be written to a married woman by any man not her husband. They refer to the good times they have had together, to the fact that the writer will probably have to go over the road for a term, and urge the recipient not to go back on him, but stand

by him, and get a divorce, and they will live together happily after his term is out. They contained much besides what is here stated; but it is not deemed necessary to state more in order to show that they were entirely sufficient to indicate an improper intimacy between the writer and the recipient. The proof that they were written by defendant consisted of evidence by Olson that he had seen defendant write a little, and that he thought the letters were in defendant's handwriting; also of evidence of one Kommers, a bank cashier accustomed to examine handwriting to ascertain its genuineness, who, after examining an admittedly genuine signature of the defendant, and comparing it with the letters and the initials appended thereto, testified that in his opinion the same person wrote them all. It would certainly have been desirable to have had more abundant proof that the letters were in defendant's handwriting, but we think the proof submitted was sufficient to warrant a ruling admitting them in evidence. After they were admitted, it was still a question for the jury whether they were genuine, and doubtless the court would have so instructed the jury had he been requested to do so; but no request of that kind was made. Hence we conclude there was no error committed in receiving the letters in evidence.

2. The contention that the evidence is insufficient to sustain the verdict cannot be sustained. Adultery is rarely proven by direct evidence. If the adulterous disposition be shown to exist between the parties, and they be shown to have been together in equivocal circumstances, such as would lead the guarded discretion of a reasonable and just man under the circumstances to the conclusion of guilt beyond a reasonable doubt, it is sufficient. 2 Greenl. Ev. §§ 40, 41; *Baker v. U. S.* 1 Pin. 641. The circumstances shown here, in our judgment, were sufficient to comply with this rule and justify the verdict which the jury rendered.

By the Court.—Judgment affirmed.

114 169
117 *224

ROSSMILLER, Plaintiff in error, vs. THE STATE, Defendant in error.

March 14—April 1, 1902.

Statutes: Construction: Legislative intent: Navigable waters: Powers of the state: Ownership of ice, etc.: Rights of the people: Constitutional law.

1. The legislative intent of a law being plain, that intent must be considered the sole purpose of the enactment, however unreasonable or absurd the law may appear when so viewed.
2. An exposition of the meaning of a law in the law itself cannot be departed from by the courts.
3. The title to the beds of navigable lakes within the state of Wisconsin is vested in the state in trust to preserve the same for the enjoyment of the people. The state has no proprietary right in such beds or in the water above the same, nor in the fish that inhabit such water or the fowls that resort thereto, or the ice that forms thereon, which it can deal in by sale or otherwise.
4. The power of the state over navigable waters within its boundaries is limited to the enactment and enforcement of such reasonable police regulations as may be deemed necessary to preserve the common right of all to enjoy the same for navigation by boats or otherwise, and all incidents of navigable waters, including the taking of ice therefrom for domestic use or sale.
5. The rights of the people in the navigable waters of the state are the same as those incident to tidal waters at common law. They are beyond the power of the state to interfere with, except by reasonable police regulations, as before indicated.
6. The state has no greater right to sell ice that forms upon navigable lakes than to sell the water thereof in a liquid state or the fish that inhabit the water. It can do neither, the whole beneficial use of public waters being in the people of the state as a class.
7. When the term "people of the state" is used to designate the beneficiaries of the trust in navigable waters, all the people who may choose to enjoy the same within the state are referred to, whether citizens of the state or persons who come within its territory for the purpose of enjoying such public rights.
8. A law treating some persons within the state differently than others, in respect to the enjoyment of public waters, violates the fourteenth amendment of the national constitution, guar-

antying to all persons within the jurisdiction of the state the equal protection of the laws.

9. The right to take ice from public waters within the state being a possession of all the people thereof, a law which exacts from any individual a sum of money as a consideration for the enjoyment of such waters, upon the theory that the state is the owner of the ice, violates the fourteenth amendment of the federal constitution, prohibiting any invasion of the right to liberty and property without due process of law, and violates sec. 13, art. I, of the state constitution, prohibiting the taking of private property for public use without just compensation.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the municipal court of Racine county: WILLIAM SMIEDING, JR., Judge. *Reversed.*

Error to review the judgment convicting the plaintiff in error for violating ch. 470, Laws of 1901, which provides in brief as follows:

Sec. 1. The cutting of ice from any meandered lake of the state, for shipment out of the state, is prohibited except by those permitted to do so by a license issued by the secretary of state in the manner herein prescribed, on or before the first Monday of September immediately preceding the season for such cutting.

Sec. 2. Such license shall not be issued till the party applying therefor shall file with such secretary a bond in the sum of at least $10,000, with sufficient sureties, satisfactory to such secretary, conditioned that the applicant will comply with this act.

Sec. 3. Every such licensee shall, on or before the first Monday in November succeeding the year covered by his permit, file with such secretary a verified statement of the number of tons of ice cut and shipped out of the state thereunder during such year, and pay into the state treasury, on or before the first day of December thereafter, ten cents for each such ton.

Sec. 4. Making a false statement under the foregoing sec-

tion shall constitute the crime of perjury, and the guilty person shall be subject to punishment accordingly.

Sec. 5. Any sum due from any licensee under this act may be collected in an action in any circuit court in the name of the state, commenced at the instance of the attorney general or any citizen thereof.

Sec. 6. The income derived from the execution of this act shall form a part of the common school fund.

Sec. 7. Any person, whether acting as principal, agent or employee, who shall cut and ship ice out of the state in violation of this act, in addition to any other penalty incurred under the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $100 nor more than $1,000, or imprisonment for not less than thirty days nor more than one year, or both such fine and imprisonment, in the discretion of the court.

Sec. 8. Any licensee under this act failing to comply with section 2 hereof shall forfeit the sum of $5,000 for each offense, and the attorney general shall enforce such forfeiture by an action upon the licensee's bond.

Sec. 9. Ice formed upon the meandered lakes of the state is the property of the state. The design of this act is to prevent such cutting and shipping except upon condition of the state being compensated for the ice to the amount of ten cents per ton.

After the passage of such act by the legislature, it received the approval of the governor upon the theory, solely, that the ice formed upon navigable lakes of the state is state property, which it may sell as a means of adding to the public revenues.

The plaintiff in error cut and shipped ice out of the state without complying with the act. He was informed against therefor as being guilty of a misdemeanor under sec. 7 thereof. Upon the trial counsel for plaintiff in error insisted that

he was not guilty of having committed any offense under the laws of this state, because the act attempting to make conduct such as he was charged with an offense is unconstitutional and void for several reasons specified. The court decided otherwise. Under such decision the evidence established the guilt of the accused. He was found guilty, and a judgment was rendered accordingly, requiring him to pay a fine of $100 and costs.

For the plaintiff in error there was a brief by *Kearney, Thompson & Myers,* and oral argument by *T. M. Kearney* and *J. L. O'Connor.* They argued that ch. 470, Laws of 1901, is void in that it is an attempt to establish an ownership in the state as proprietor of the meandered lakes lying within the state, contrary to the trust reposed in the state therein for the public purposes of navigation, fishing, and kindred public uses. *McLennan v. Prentice,* 85 Wis. 427–444; *Ill. Cent. R. Co. v. Illinois,* 146 U. S. 387; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534, 550; *Willow River Club v. Wade,* 100 Wis. 86, 113; *Att'y Gen. ex rel. Askew v. Smith,* 109 Wis. 532; *Pewaukee v. Savoy,* 103 Wis. 271, 274; *Priewe v. Wis. State L. & I. Co.* 103 Wis. 537, 549; *Brown v. Cunningham,* 82 Iowa, 516; *Ill. Steel Co. v. Bilot,* 109 Wis. 418. The taking of ice from a meandered lake is a public use, and every one is entitled to take it as of common right so long as no trespass is committed in the taking. *Cummings v. Barrett,* 64 Mass. 186; *Roxbury v. Stoddard,* 89 Mass. 158; *Gage v. Steinkraus,* 131 Mass. 222; *Hittinger v. Eames,* 121 Mass. 539; *People's Ice Co. v. Davenport,* 149 Mass. 324; *Brastow v. Rockport Ice Co.* 77 Me. 100; *McFadden v. Haynes Ice Co.* 86 Me. 319; *Woodman v. Pitman,* 79 Me. 456. The act is an attempt to take for public use, without making just compensation, the property right of the owners of lands abutting on meandered lakes to take ice therefrom, and is in violation of sec. 13, art. I, Const. *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Boorman v.*

Sunnuchs, 42 Wis. 233; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248; *Cohn v. Wausau Boom Co.* 47 Wis. 322; *Janesville v. Carpenter,* 77 Wis. 300; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534. The act violates sec. 1, art. VIII, Const., prescribing uniformity in the rule of taxation, in that it attempts to impose a tax by way of discrimination upon ice shipped out of the state. In levying a license fee, charge, or duty upon any article of trade or commerce shipped out of the state, the state is attempting the exercise of a branch of its taxing power. *Gibbons v. Ogden,* 9 Wheat. 188-201; Lewis, Federal Power over Commerce, 91; *Robbins v. Shelby Co. Tax Dist.* 120 U. S. 489. For the purpose of general taxation ice stored is clearly personal property and as such subject to assessment. Stats. 1898, sec. 1036; *Winkley v. Newton* (N. H.) 35 L. R. A. 756. The act in question subjects ice shipped outside of the state to double taxation, and for that reason is invalid. The act violates the third subdivision of sec. 8, art. I, Const. of U. S., in that it is an attempt on the part of the state to regulate commerce among the several states. *Gibbons v. Ogden,* 9 Wheat. 188; *Mobile Co. v. Kimball,* 102 U. S. 702; *Fuller v. C. & N. W. R. Co.* 31 Iowa, 187; *Council Bluffs v. K. C., St. J. & C. B. R. Co.* 45 Iowa, 338; *Crow v. State,* 14 Mo. 237; *Indiana v. Pullman P. C. Co.* 16 Fed. 192; *Kaeiser v. I. C. R. Co.* 18 Fed. 151; *Fry v. State,* 63 Ind. 562; *Carton v. I. C. R. Co.* 59 Iowa, 148; *Bennett v. Am. Exp. Co.* 83 Me. 236; *St. Clair Co. v. Interstate Trans. Co.* 109 Fed. 741. The power vested in Congress to regulate interstate commerce is exclusive. *Gibbons v. Ogden,* 9 Wheat. 188, 209; *In re State Freight Tax,* 15 Wall. 236; *Mobile Co. v. Kimball,* 102 U.S. 691; *Kaeiser v. I. C. R. Co.* 18 Fed. 151; *Gatton v. C., R. I. & P. R. Co.* 95 Iowa, 112; *Hardy v. A., T. & S. F. R. Co.* 32 Kan. 698; *Foster v. Blue Earth Co.* 7 Minn. 140; *Thoms v. Greenwood,* 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. after p. 768. The act violates the fifth sudivision of sec. 9, art. I,

and the second subdivision of sec. 10, art. I, Const. of U. S., in that it attempts to lay a tax, impost, or duty in no manner necessary to or connected with any inspection law of the state, upon exports therefrom, without the consent of Congress. Any attempt on the part of a state legislature to impose a license fee, tax, or charge upon a commercial commodity or upon the owner thereof as a condition to the right to ship such commodity into another state, is an interference with interstate commerce, within the constitutional provisions contained in said sections. *Reading R. Co. v. Penn.* 15 Wall. 280; *Almy v. California,* 24 How. 169; *State ex rel. Corwin v. Indiana & Ohio O., G. & M. Co.* 120 Ind. 575; *Jamieson v. Indiana N. G. & O. Co.* 128 Ind. 555; *Carson River L. Co. v. Patterson,* 33 Cal. 340; *Blount v. Munroe,* 60 Ga. 64, 66; *Low v. Austin,* 13 Wall. 34; *Pickard v. Pullman S. C. Co.* 117 U. S. 34; *St. Louis v. W. U. Tel. Co.* 39 Fed. 60; *Leloup v. Mobile,* 127 U. S. 647; *Pullman S. C. Co. v. Nolan,* 22 Fed. 280; *Jackson Mining Co. v. Auditor General,* 32 Mich. 488; *State v. C. & P. R. Co.* 40 Md. 22. It is manifest that the purpose of the law is to secure revenue and not to protect the public through reasonable regulations from fraud in manufactured articles, or from injury to health through the distribution of deleterious food substances. It is, therefore, an attempted exercise of the taxing power of the state and not of its police power, and for that reason is in conflict with the provisions of the federal constitution last cited. State & Fed. Cont. of Per. & Prop. 482. *Brown v. Maryland,* 12 Wheat. 419, 447; *McCulloch v. Maryland,* 4 Wheat. 413; *Guy v. Baltimore,* 100 U. S. 434, 443; *Brimmer v. Rebman,* 138 U. S. 78.

For the defendant in error there was a brief by the *Attorney General,* and oral argument by the *Attorney General* and *Mr. E. N. Warner,* law examiner. They contended that the state has the right to entirely prohibit the exportation of fish, game and ice. Gould, Waters (3d ed.) sec. 189; *Mc-*

Cready v. Virginia, 94 U. S. 391; *Geer v. Connecticut,* 161 U. S. 519; *Bittenhaus v. Johnston,* 92 Wis. 588; *West Roxbury v. Stoddard,* 7 Allen, 158; *Organ v. State,* 56 Ark. 270; *Sanborn v. People's Ice Co.* (Minn.) 51 L. R. A. 829; *Ex parte Maier,* 103 Cal. 476; *State v. Rodman,* 58 Minn. 393; *Magner v. People,* 97 Ill. 320; *Hagerty v. St. Louis I. M. & S. Co.* (Mo.) 40 L. R. A. 151. If the state can forbid the transportation of ice out of the state, it may consent to the transportation of ice out of the state upon such conditions as it may see fit to impose. *Comm. v. Hilton* (Mass.) 45 L. R. A. 475. The ice upon meandered lakes is the property of the state, and the regulation with respect to the taking thereof falls within the powers of the legislature. *Sanborn v. People's Ice Co.* (Minn.) 51 L. R. A. 829; *Concord Mfg. Co. v. Robertson* (N. H.) 18 L. R. A. 679. The act in question is an exercise of the police power of the state, and the method and discretion of such exercise is reposed in the legislature. *Munn v. People,* 69 Ill. 93; *Willis v. Standard Oil Co.* 50 Minn. 290. Being an exercise of the police power, it in no wise conflicts with sec. 8, art. I, Const. *McCready v. Virginia,* 94 U. S. 391; *People v. Lowndes,* 130 N. Y. 462; *Geer v. Connecticut,* 161 U. S. 519.

MARSHALL, J. Is ch. 470, Laws of 1901, valid? That is the only question involved in this case. An affirmative answer would require an affirmance of the judgment, and a negative answer a reversal thereof and a direction to the trial court to discharge the plaintiff in error.

There is no room for controversy, either as to the intent of the lawmaking power in the enactment here called in question, or but that both the legislative and executive idea, in placing the same on the statute book, was that it dealt with a subject of vast importance to the state. There are some striking features in the act indicating that with all the certainty of a mathematical demonstration. The severe penalties and for-

feitures provided for, of themselves, clearly evidence the magnitude of the state interest which those concerned in the legislation supposed they were conserving. The act allows no one to cut ice on the meandered lakes of the state for shipment beyond its borders, regardless of the extent of his operations, without first giving a bond to the state in the sum of $10,000. A person who makes a false statement of the extent of his operations, to the secretary of state, whether wilfully or otherwise, is made guilty of the crime of perjury and subjected to punishment therefor under the criminal laws of the state which were designed to deal with that serious offense. Any citizen of the state is armed with authority to set judicial machinery in motion in any of its circuit courts, to collect any indebtedness that may accrue to it for ice taken from its meandered lakes by any licensee. A person concerned in cutting any such ice and shipping the same out of the state, contrary to such act, regardless of his part in the operations, even though it be that of a mere employee, and regardless of whether he acts with or without knowledge that no license has been obtained to authorize such operations, and of the extent of his work, is made guilty of a misdemeanor in addition to all other offenses he may be guilty of under the act, and is made subject to punishment for such independent offense by a fine of not less than $100 nor more than $1,000; or imprisonment, presumably in the county jail, of not less than thirty days; or such imprisonment, presumably in the state prison, for the full term of one year, and at hard labor we must assume, and, as in other cases of imprisonment in the state prison, with a reasonable period of solitary confinement. If any person fails to make a report to the secretary of state of the extent of his operations, regardless of the cause of such failure, or to pay the purchase price for the ice taken by him, regardless of the amount in default, he is made liable upon his bond, filed with the secretary of state, in the sum of $5,000.

Those drastic provisions cannot be made to harmonize at all with reason and common sense, except upon the theory that it was supposed a source of great wealth, for the state to draw from to meet its legitimate expenses, existed in the ice which annually forms upon its navigable waters; that such source had remained undiscovered and unenjoyed by the rightful owner so long, and the importance of laying hold thereof for its legitimate use was so great, and the right of the matter was so plain in fact, yet so misunderstood by those who had for years enjoyed the opportunity apparently open to all as of right, that it was the duty of the legislature, not only to proclaim the property right of the state, but to take thereto its own with such an indication of the strength of its position, and the heinous character of any interference with its title, as not to admit of any reasonable excuse therefor, and so as to leave no reasonable ground to expect that any person would venture to so interfere. In that view, it seems, the law in question was conceived and brought forth, giving to that which has been supposed, since the organization of the state, to be the common heritage of all, such an indelible stamp of absolute state ownership that no right-minded person would dare violate it. In that aspect the law calls for the most careful consideration—more than the ordinary care, we should say, devoted to constitutional questions. There must be some added care, constituting a fitting recognition of the unusual importance which the lawmaking power seems to have ascribed to the act.

We are not troubled, as is sometimes the case, to determine just what is the legislative idea embodied in the act. Both the legislative and executive branches of the lawmaking power, *ex industria,* made that so plain in the act itself that it would be a reflection on their efforts in that regard to go outside thereof to find reasons to support the law by viewing it from a different standpoint than its makers intended.

Courts look to the language of a law to discover the intent thereof. When that discovery is made, such language is taken as expressing only such intent, even though a different meaning might be gathered therefrom. Vattel's rule for judicial construction, so often quoted by courts, applies to this law: 'It is not allowable to interpret what has no need of interpretation. When the meaning of a law is evident, to go elsewhere in search of conjecture in order to restrict or extend the act, would be an attempt to elude it, a method which, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless.' *Gilbert v. Dutruit,* 91 Wis. 661, 65 N. W. 511; *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 74 N. W. 544. Of course, the error in judicial administration, that rule is designed to guard against, which would make a good law bad or useless by interpretation, would make a void enactment good by the same means. There is a further feature of Vattel's rule, expressed thus: 'Where the meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which the words naturally represent.' It is fundamental that if, giving to the words of an act their literal or natural meaning, the conclusion reached would be unreasonable or absurd, some other meaning within the reasonable scope of the words may be adopted to avoid that result, if it appears that such other meaning may probably have been the one intended. *Harrington v. Smith,* 28 Wis. 43; *Mason v. Ashland,* 98 Wis. 540, 545, 74 N. W. 357; *Wisconsin Industrial School for Girls v. Clark Co.* 103 Wis. 651, 79 N. W. 422. However, where the apparently absurd meaning is unquestionably the real one, the law must stand with such meaning or fall altogether. So it will be seen that the primary purpose of the law must be kept in view in determining whether it is valid or not. It is the legislative will that must stand the test in determining whether the act is good or bad.

Looking to the language of the law here, that will seems unmistakable. If the consequences, looking at the law from that standpoint, appear fatal, we are precluded from searching for a different purpose, because the legislature has declared its intent in sec. 9. The only legitimate office of the section is to give to the act a clear legislative construction, binding on the courts. That is strictly within the power of the legislature to do. That is, the legislature may embody in an act an exposition thereof, setting forth the meaning of the language used, and thereby preclude courts from considering the subject further, perhaps, than to determine whether such meaning can reasonably be ascribed to their language. *Jones v. Surprise,* 64 N. H. 243, 245, 9 Atl. 384; *State v. Schlenker,* 112 Iowa, 642, 84 N. W. 698. That must be the law, since the only office of judicial construction of a law, as before indicated, is to enable the court to see the language thereof in the same light the legislature did. When it speaks plainly on that subject in the law itself, all judicial rules for construction are set aside or rendered useless. If we were able to pass the apparently plain meaning of the act, aided by the equally plain legislative declaration in that regard, we would yet have to pass the explicit exposition of the law made by the executive when he gave it his approval, which we may properly look to in cases of doubt, before reaching a field where any other purpose could be assigned to the enactment than to deal with ice formed on the meandered lakes of the state as its property,—to sell privileges to enjoy such property, for public revenue only.

What has been said leads up to this as the vital question: Is ice, formed naturally upon the public waters of the state, state property in a proprietary sense,—property which it can deal with as a private person deals with his property rights? It must be assumed without discussion that no property right was acquired by the state by the mere legislative declaration that ice formed upon meandered lakes within the boundaries

of the state belongs to the state as property. The legislature has no such arbitrary power, under our constitutional system, as that of changing the nature of the ownership of property by its mere fiat. It can no more accomplish that result in that way than it can change the laws of nature by a legislative declaration. Ice formed on public water is the absolute property of the state independent of any legislative assertion in that regard, or not at all. We would not for a moment indulge in the idea that any branch of the lawmaking power, responsible for placing upon the statute books the enactment in question, thought otherwise. The declaration as to state ownership was a mere proclamation that henceforth the state proposed to sell its ice, or give it away, according as the same was desired for domestic consumption or shipment outside the state, it being supposed, as indicated by the executive approval of the enactment, that the fact of state ownership was not open to question. Of course, if in that there was a misconception of the law, the law remains unchanged notwithstanding. "An enactment of the legislature based on an evident misconception of what the law is will not have the effect, *per se,* of changing the law so as to make it accord with the misconception." *Byrd v. State,* 57 Miss. 243, 247.

What is the real nature of the state's interest in ice formed upon its public waters, if it were not for the attitude of the lawmaking power as indicated, we must confess, in the light of the repeated decisions of this and other courts, would not seem to be open to serious question. As matters stand, we feel constrained to say, it appears that the indications, from the origin of the state's interest in public waters and the purposes to be served thereby, and the judicial declarations in regard thereto in this and other courts, are on one side of the controversy, and the legislation is upon the other. Unless that appearance can be changed, since the proposition involved is purely of a judicial character, there can be no ques-

tion as to which view must prevail. It has been universally supposed, we venture to say, that the right of every person within the state to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like enjoyment, subject only to such mere police regulations as the legislature may in its wisdom prescribe to preserve the common heritage of all, is a constitutional right of all persons within the state. While the language used in speaking of the subject is sometimes restrictive, looking at the same only in the literal sense thereof, in that it points only to the people of the state, obviously the rule includes all people lawfully within the state, whether of the state, in the sense of being residents thereof, or otherwise. It has not been supposed that the state could deal with public waters, or with any other thing held upon a like trust to that of such waters, as the proprietor thereof,—that any such thing could be treated in any respect as the absolute property of the state, and used for purposes of revenue. Obviously, there can be no difference between public water in a liquid condition and in the form of ice, or between water and the land covered thereby, or the fish or fowls which inhabit the same, or any of the animals *feræ naturæ,* in respect to sovereign authority over the same. If one may be dealt with as the absolute property of the state, the others may be. It follows that, if the legislation in question be valid, the right to take water from navigable lakes for shipment, though it in no way affect the character thereof for other public purposes, and the right to fish and hunt, may be subjects of sale by the state for the mere purpose of adding to the public revenues; those things which have been supposed to be public and for the individual enjoyment of all without restraint, other than by reasonable police regulations to preserve their character in that regard, things above sovereign authority to barter in as in ancient systems entirely foreign to ours, will

cease to have that character in fact, and our notions in regard thereto will have to be readjusted to the newly established condition,—that which regards the state, not as a mere trustee for the whole people, of the subjects we have mentioned, but as the absolute owner thereof, with power to deal therewith as a private person might if he were such owner.

After the most painstaking investigation which we can give to the act under consideration to the end that it may be sustained, if possible, we confess our inability to discover anything in reason or authority to support the idea of state ownership of ice formed on public waters. The learned attorney general, after exhausting, we must assume, the resources of his office to that end, has not been able to aid us. His printed brief and oral argument as well are implied confessions thereof, and without any reflection, we will say in passing, upon either his industry or ability in the discharge of official duty. The attorney general makes suggestions in regard to how the law might be held valid, by assuming that its purpose is other than merely to traffic in ice; but as we view the law we are not warranted in departing from that purpose. We will say, however, that if we could see any legislative intent to exercise police power to prevent injury to common rights by depleting navigable waters, as the court found in *Sanborn v. People's I. Co.* 82 Minn. 43, 84 N. W. 641, cited to our attention with confidence by counsel for the state, we should hesitate before announcing that the taking of ice from a large body of navigable water could be reasonably legislated against as interfering with common rights by reducing the level of the lake. It was held in that case, in accordance with elementary principles, that the taking of ice from public waters, by any one who can lawfully gain access thereto, is a constitutional privilege,— one common to all persons; and, impliedly, that legislative power in regard thereto extends only to such reasonable regulations as will prevent the enjoyment by one person from invading

the common right of enjoyment. There is no suggestion in the opinion of the court that ice formed on public waters is a subject of state ownership—property which it can sell to replenish its treasury. The action was grounded on the right of a riparian proprietor to prevent injury to his riparian rights by a lowering of the level of the water. Two members of the court, in a vigorous dissenting opinion which indicates much study of the subject, gave as their view of the law that the right to take ice from public waters for the consumption of the takers, or for sale as an article of commerce, is common to all, and is so superior to riparian rights that the owner of the latter cannot interfere with the enjoyment of the former on the ground that it reduces the level of the water.

This reason is advanced in *Sanborn v. People's I. Co., supra,* for the conclusion there reached, which we are urged by counsel for defendant in error to adopt: While ice formed on public waters is common property, it is not such property for purely commercial purposes; no one has an absolute right to appropriate therefrom more than he needs for his domestic use. If that were so, it would not follow that the surplus ice belongs to the state and may be appropriated for revenue purposes. But the doctrine itself seems to be out of harmony with all well-recognized principles of public waters. As suggested in the dissenting opinion, if the privilege to take ice only entitles each person to sufficient of the common stock for his domestic needs, then the common privileges of fishing and hunting must be likewise limited. We are not aware of any such limitation. The right to take game for sale, or to take water or ice from the public stock for that purpose, has never been questioned under our system, so far as we are aware. To establish the contrary would be a most serious impairment of common rights in navigable waters. Those rights cannot be too carefully guarded. That they extend to the taking of ice for sale, as well as for the domestic

use of the appropriator, has been repeatedly held where public rights in such waters are no more extensive or clearly defined and maintained than in this state. In *People's Ice Co. v. Davenport,* 149 Mass. 322, 21 N. E. 385, the court said:

"It is too well settled to be disputed that the property in the great ponds is in the commonwealth, that the public have the right to use them for fishing, fowling, boating, skating, cutting ice for use or sale, and other lawful purposes."

The supreme court of Iowa, in *Brown v. Cunningham,* 82 Iowa, 512, 516, 48 N. W. 1042, used this vigorous language in condemning the idea of government ownership, strictly so called, in public water:

"The government has no more property in the water than a riparian owner or the public. The beneficent Creator opened the fountains which filled the stream for the benefit of his creatures, and has bestowed no power upon man or governments created by man to defeat his beneficence. Of course the use of the water may be regulated by the state, but the state may not forbid its use to the people."

In the state of Maine it is held that the limit of state authority to interfere with the taking of ice from public waters is the making of regulations which will preserve the common right to do so. *Barrows v. McDermott,* 73 Me. 441; *Woodman v. Pitman,* 79 Me. 456, 10 Atl. 321. In *Brastow v. Rockport Ice Co.* 77 Me. 100, it was held that the right to take ice from a navigable lake is the common right of all and is governed by the same rule as the public right to boat and fish. In *Woodman v. Pitman, supra,* it was held that the right to take ice from navigable waters is as absolute as the right to walk upon the ice. In *Rowell v. Doyle,* 131 Mass. 474, the court said:

"The right of fishing, as well as the right of taking ice in a great pond, is a public right, which every inhabitant who can obtain access to the pond without trespass may exercise, so long as he does not interfere with the reasonable exercise

by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority."

It must be understood, in considering the above, that the reference to legislative regulations refers merely to such as the lawmaking power may adopt for the purpose of preserving the common rights, not to such as may be enacted to abridge or destroy those rights by treating the ice as state property instead of, if property at all in its natural state, that of the whole people. In *Wood v. Fowler,* 26 Kan. 682, the court said, in effect, that the right to take ice, as the right to take fish in public waters, is in the whole people, and that the first taker becomes, by his act of actual appropriation, the owner. The same was held in *Concord Mfg. Co. v. Robertson,* 66 N. H. 1, 25 Atl. 118, and is laid down by text writers as elementary. Gould, Waters, § 191.

From the foregoing it will be seen that wherever the title to the beds of navigable waters is in the state for public purposes, all the incidents of public waters at common law exist, and that they include the public right of taking ice to the same extent as the right of taking fish.

Up to this point we have not referred to authority in our own state, because we have none that applies, except in principle. We have abundance of judicial authority that applies when it is understood, as the fact is, as clearly indicated by what has been said, that the right to take ice from navigable lakes is of the same nature as any of the incidental rights of the people in such waters. We have demonstrated that, as it seems, if it can be done by reference to authority. We have by no means exhausted the decisions of the courts on the subject, but it seems useless to add more since there are no contrary decisions. We are safe in saying that no court has more definitely declared that the interest of the state in its navigable waters and the lands under them, and all the incidents thereof, are purely of a trust character, the benefici-

aries, on a plane of perfect equality, being the whole people of the state, than this court has done in recent years. In doing that, it is believed, the people have been rescued from all dangers of losing any of those common rights by the invasion thereof by claims of private owners, if such dangers ever existed. That judicial service would be of little value if mere state ownership for the preservation of the common rights were so perverted as to support a claim of state ownership in hostility to such rights, a principle which, in the possibilities of its development, might lead to a serious impairment, if not utter ruin, of a most important trust. Such a consummation would be a very demoralizing example of how the subject of a trust may be converted to the private benefit of the trustee.

This court has repeatedly said that the navigable waters of the state have substantially the incidents of tidal waters at common law; that the title to the beds of such waters was reserved for the state by the Ordinance of 1787, and vested in it at the instant it was admitted into the Union, to preserve the public character of such waters with all such incidents; and that the state never has and never can constitutionally impair the trust. *McLennan v. Prentice,* 85 Wis. 427, 444, 55 N. W. 764; *Willow River Club v. Wade,* 100 Wis. 86, 113, 76 N. W. 273; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 550, 67 N. W. 918; *Priewe v. Wis. S. L. & I. Co.* 103 Wis. 537, 79 N. W. 780; *Pewaukee v. Savoy,* 103 Wis. 271, 274, 79 N. W. 436; *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185; *Illinois S. Co. v. Bilot,* 109 Wis. 418, 84 N.W. 855, 85 N.W. 402; *Att'y Gen. ex rel. Askew v. Smith,* 109 Wis. 532, 85 N. W. 512. In *McLennan v. Prentice,* quoting from the opinion of Mr. Justice FIELD in *Illinois Cent. R. Co. v. Illinois,* 146 U. S. 387, 13 Sup. Ct. 110, the court said:

"The right which the state holds in these lakes is in virtue of its sovereignty and in trust for public purposes of naviga-

tion and fishing. The state has no proprietary interest in them, and cannot abrogate its trust in relation to them."

In *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918, and again in the same case in 103 Wis. 548, 79 N. W. 780, it was held, in effect, that the state has no such interest in the beds of navigable lakes that it can treat the same as a subject for bargain and sale or grant the same away to private owners under the guise of police power or otherwise; that it is a mere trustee of the title thereto, under a trust created before the state was formed, to which it was appointed as trustee by its admission into the Union; that it has no active duty to perform in respect to the matter, or power over the same, except that of mere regulation to preserve the common right of all; that its power over the *res* is limited by the original purpose of the trust; that it is, in effect, a mere trustee of an express trust, a trustee with duties definitely defined. Those principles are too firmly established to admit, at this late day, of being seriously questioned. It seems clear that if the state cannot sell the bed of a navigable lake, it cannot sell the waters thereof, or the fish therein, or the fowls that resort to its surface, or the ice that forms thereon. The rules that limit its right as to one of those matters, limit its power as to all.

The foregoing seems not only to leave no reasonable, but no possible, doubt as to the conclusion which ought to be reached in this case. It stamps the act in question, indelibly, as the result of a misconception of the state's interest in navigable lakes, and as being baseless and unconstitutional. The title to the beds of such lakes is in the state, but not for its own use as an entity. The mere naked legal title rests in the state, but the whole beneficial use thereof, including the use of the ice formed thereon, is vested in the people of the state as a class. The class opens to let out all who pass beyond, and to let in all who come within, its borders. Presence within the state is all that is necessary to participate in the

common right. Any law to the contrary violates the fourteenth amendment to the federal constitution, guarantying all persons within the jurisdiction of the state the equal protection of the laws. The state can no more appropriate to itself the ice formed upon its navigable lakes, or other navigable waters, than one person can rightly appropriate the property of his neighbor against the latter's will, and pass that title by bargain and sale, or otherwise, to the third person. Since the whole beneficial use of navigable lakes is unchangeably vested in the people, every one within the state having the right to enjoy the same so long as he does not invade the like right of another, without any interference by claim of paramount right to the subject thereof, any law invading that individual possession is, in effect, an invasion of the right to liberty and property without due process of law, contrary to said fourteenth amendment. Any such invasion for the purpose of adding to the public revenues, exacting from a person, for the benefit of the state, compensation for the enjoyment of a right which belongs to him and which he has a right to enjoy without paying therefor, violates sec. 13, art. I, of the state constitution, prohibiting the taking of private property for public use without just compensation.

It is a matter of keen regret that we are compelled to place the stamp of judicial condemnation upon the work of coordinate branches of the government. That is true in any case, but it is especially true here, since it turns to naught a strongly fortified supposed new discovery of a rich source for adding to the revenues of the state. It is the duty of the judiciary to protect, at all points, the constitutional rights of the people from legislative interference. That duty must be performed without hesitation, with firmness and with completeness whenever the necessity therefor arises, or the blessings of constitutional liberty, as we understand the same to exist, will soon fade away. The wisdom of the fathers in securing to the whole people the right to enjoy the navigable

waters of the state, with all their common-law incidents, beyond the possibility of any rightful prejudicial governmental interference therewith, and the consistent and vigorous defense of such right by the judiciary, will be more and more appreciated as time goes on. The right is deemed to be so strongly intrenched that all assaults upon it must fail.

By the Court.—The judgment is reversed, and the cause remanded to the trial court with directions to discharge the plaintiff in error.

LAWLESS, Plaintiff in error, vs. THE STATE, Defendant in error.

March 14—April 1, 1902.

(1) *Appeal and error: Review of evidence: Motion for new trial.*
(2, 3) *Forgery: Material alteration of check: Uttering.*

1. The refusal of the trial court to direct a verdict is reviewable in the appellate court if proper exception was taken and preserved in the bill of exceptions, although there was no motion for a new trial. *Reed v. Madison*, 85 Wis. 667, limited.
2. Insertion of the figure 5 before the figure 9 in a check reading "Pay to [defendant] or order $ 9.....fifty cents..... Dollars" is a material alteration, constituting a forgery, although the written words remained unchanged and the person cashing the check might by close observation have detected the change and prevented the consummation of the fraud.
3. The payee named in a forged check may be guilty of uttering it although he does not indorse it.

ERROR to review a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The plaintiff in error was tried, convicted, and sentenced to state prison for uttering a forged check. The check as originally drawn was as follows:

"IRON COUNTY BANK. No. 34.
"Crystal Falls, Mich., Aug. 5, 1901.
"Pay to George Lowless or order $ 9.....fifty cents .....Dollars. C. T. ROBERTS."

The forgery consisted in putting the figure "5" before the figure "9" in the check. The plaintiff in error requested one Jacob Kiefer, a saloon keeper at Ableman, Wisconsin, to cash the check for him, telling him it was for $59.50. He received $59 for the check, Mr. Kiefer retaining fifty cents for cashing it. The evidence showed that plaintiff in error had been employed at Crystal Falls, Michigan, by Mr. Roberts, who was a mining superintendent. The latter had promised to pay his transportation to North Freedom, Wisconsin, and gave him the check for $9.50 for that purpose. The evidence also showed the forgery as stated.

At the close of the evidence the counsel for accused moved the court to direct a verdict of acquittal on the ground that no material alteration in the check had been shown. The motion was denied, and duly excepted to. He then requested the court to charge the jury that the alteration shown was not material. This was also denied, and excepted to. There was no motion for a new trial, no exceptions to the charge, and no motion in arrest of judgment. The case is brought here for review on writ of error.

For the plaintiff in error the cause was submitted on the brief of *Evan A. Evans.* He contended, *inter alia,* that where the act of forgery consisted in an alteration it must be proven that the alteration was a material one and that an added liability was created by reason of the alteration. Clark, Crim. Law (2nd ed.), 340; *State v. Dorrance,* 86 Iowa, 428; *State v. Davis,* 53 Iowa, 252; *Hunt v. Adams,* 6 Mass. 519; *Cox v. State,* 66 Miss. 14. There being a discrepancy between the figures and the written words "fifty cents," the latter govern, and no change in the figures would make any difference. Selover, Neg. Inst. sec. 92; 2 Am. & Eng. Ency. of Law, 329, note 9; *Smith v. Smith,* 53 Am. Dec. 652; Laws of 1899, ch. 356, sec. 1675–17, subd. 1.

For the defendant in error there was a brief by the *Attor-*

ney General, and oral argument by *R. F. Hamilton,* second assistant attorney general.

BARDEEN, J. There was no motion for a new trial and no exceptions to the charge. The only question for consideration is the one arising upon the denial of the motion to direct a verdict of acquittal, and upon the refusal of the court to instruct the jury as requested. That such questions are properly before us for consideration has been decided by this court in several cases. See *Zahn v. M. & S. R. Co., ante,* p. 38, 89 N. W. 889, and cases cited. The only case to which our attention has been called seeming to hold a different rule is *Reed v. Madison,* 85 Wis. 667, 56 N. W. 182. In that case the motion for a new trial was not interposed until after judgment, and no appeal was taken from the order denying the motion. The decision is right on principle, but what was said in reference to the court's reviewing the evidence in absence of a motion for a new trial, must be read in connection with what was said in *Second Nat. Bank v. Larson,* 80 Wis. 469, 50 N. W. 499, and is limited thereby. The refusal of the court to direct a verdict, when proper exception thereto is taken and preserved in the bill of exceptions, requires this court to review the testimony in order to determine whether the motion should have been granted.

The proof disclosed that Roberts gave plaintiff in error a check intended to be for $9.50, but written in the form set out in the statement. The latter knew the amount, and knew it was given to pay his transportation to Wisconsin. When he presented the check, and requested Mr. Kiefer to cash it, it had been changed, and he represented it to call for a much larger amount. An expert might not have been deceived by the change, but one inexperienced in handling checks might very well have been deceived, as Kiefer was. The check in a material and a prominent part had been altered, and it does not matter that the words "fifty cents" remained as written,

or that by close observation the party cashing it might have detected the forgery and prevented the consummation of the fraud. A case similar in nearly all its aspects is *Comm. v. Hide,* 94 Ky. 517, 23 S. W. 195. In that case the change was in writing figure "3" before the figures thus, "$ $\frac{70}{100}$" near the top of the check, toward its right-hand margin. The line below read, ".....seventy cents..... ^{12} dollars." The court held the alteration material, and sustained the conviction. See *State v. Schwartz,* 64 Wis. 432, 25 N. W. 417; *Mitchell v. State,* 64 Ga. 448; *Rembert v. State,* 53 Ala. 467; *Baysinger v. State,* 77 Ala. 63; *Lampkin v. State,* 105 Ala. 1, 16 South. 575. The rule that if the instrument is void on its face it is not the subject of forgery, does not apply. The check in question was not void on its face. It called for the payment of a sum of money. The change made in it gave it the capacity to mislead and deceive the unwary. Its vicious capacity to defraud was certainly known to the accused. He represented that it called for a much larger sum than he knew he was entitled to. It comes with very poor grace from him now to say that the person who cashed the check for him ought not to have been deceived. The fact remains that he *was* deceived, and the accused profited by such deception. We think the alteration was material, and of such a character as was calculated to deceive nonexperts.

The point that the accused could not be held liable for uttering the forged check because he did not indorse it merits but little consideration. Such title as the accused had therein was passed by the transfer, and Mr. Kiefer acquired the right to have the accused make the proper indorsement. Sec. 1676–19, ch. 356, Laws of 1899. The trial court committed no error in denying the motion to direct an acquittal or refusing to instruct as requested.

By the Court.—The judgment is affirmed.

LANPHERE, Plaintiff in error, vs. THE STATE, Defendant in error.

114 193
116 *276

February 1—April 22, 1902.

Criminal law and practice: Former jeopardy: Court and jury: Withdrawal of plea: Re-entry: Waiver of irregularities: Rape: Evidence of other offenses: Corroboration: Instructions to jury: Alibi: Judgment after death of trial judge.

1. Where, upon a special plea (in this case a plea of former jeopardy, alleging that the jury at a former trial was discharged without defendant's consent), the facts are all to be determined from the record, the court may take judicial notice of the record and decide the question without a finding of the jury.
2. From an information charging the commission of an offense on a certain day, the court refused to strike out words charging also its commission "on divers other days and times" between said day and a subsequent date; but defendant was tried only for the offense committed on the day first named, and the jury were restricted to that particular day in considering the case. *Held*, that there was no prejudicial error.
3. Where a plea of not guilty is withdrawn by leave of court to enable defendant to enter a special plea, and the latter is overruled, the former plea may be re-entered by the court without a formal re-arraignment and plea by the defendant.
4. In such a case by failing to object to the re-entry by the court of the plea of not guilty, and by going to trial on the merits, defendant waives any irregularity in such re-entry of the plea.
5. Upon a prosecution for rape of a child under the age of consent, where the circumstances were such that had she been over the age of consent the offense would have been fornication, evidence of other violations of her by the defendant was admissible as tending to corroborate the testimony as to the particular act charged.
6. The uncorroborated testimony of the prosecutrix may be sufficient to sustain a conviction of rape, especially if she was under the age of consent.
7. The fact that the prosecutrix gave birth to a child at a time consistent with the accusation is corroboration of her testimony.
8. Although if a witness wilfully testifies falsely as to any material matter the jury may properly reject all of his testimony which is not corroborated by some other credible evidence, yet

on a trial for rape where the case rested mainly upon the testimony of the prosecutrix and that of the defendant, either of whom might have testified falsely as to some matters, though not wilfully so, it was prejudicial error to charge the jury that "it is a rule of common sense and sound logic that a party who testifies falsely upon any material question shall not be believed upon any other question, unless his evidence is fully and strongly corroborated."

9. An instruction on a trial for rape that "the prosecutrix has been corroborated in many respects as to almost every fact that she testified to," was an invasion of the province of the jury, and prejudicial error.

10. An instruction that the evidence produced by defendant to show an alibi did not necessarily establish beyond question the impossibility of his having committed the crime as charged, was erroneous, since it might have been so understood by the jury as to be prejudicial.

11. The judge of another circuit who was called in to preside at the trial having died, judgment was properly pronounced by the court with its own judge presiding.

ERROR to review a judgment of the circuit court for Clark county: D. H. JOHNSON, Judge. *Reversed.*

Writ of error to review the conviction of plaintiff in error of the crime of rape on a female under the age of consent. The cause was twice tried. On the first trial the jury were unable to agree upon a verdict, and the judge, exercising his discretionary power in the premises, discharged them and ordered the accused held for another trial. The venue was thereafter duly changed to Clark county, and the cause was in due time brought on for trial before the circuit court for such county, Hon. D. H. JOHNSON, judge of the second circuit, presiding, he having been duly called in to hold the court. By permission of the court plaintiff in error withdrew his plea of not guilty and filed a plea of former jeopardy in bar of further proceedings in the cause. The former jeopardy alleged was the trial theretofore had, where, as before stated, the jury were discharged because they were unable to agree upon a verdict. Plaintiff in error, in his special plea, insisted that a second trial could not be had because

he did not consent to the discharge of the jury upon the first trial. The judge, against objection by counsel for plaintiff in error, held that the special plea presented only a question of law, upon facts which were matters of record in the cause and of which he would take judicial notice. It appearing by the recorded history of the former trial that the jury were discharged after considering the cause for nearly twenty-four hours and reporting to the court that they were unable to agree upon a verdict, the plea was overruled. The plea of not guilty was then re-entered by the clerk by order of the court, without any new arraignment and without objection being made thereto on behalf of plaintiff in error. A motion was then made to discharge the accused upon the ground that the court had no jurisdiction to try him, in order to save for future review all questions raised by the special plea.

The cause then proceeded to trial, no objection being made by or on behalf of plaintiff in error on the ground that issues were not properly formed for a trial of the cause upon the merits. The charge contained in the information was in the following language:

"On the 4th day of August, A. D. 1898, and on divers other days and times between said 4th day of August and the 1st day of September, A. D. 1898, *Dell Lanphere* did with force and arms in and upon Martha Ringe, a female child under the age of fourteen years, to wit, of the age of thirteen years, feloniously make an assault and her, the said Martha Ringe, then and there feloniously did unlawfully and carnally know and abuse, contrary to the statute," etc.

Before any evidence was introduced a motion was made on behalf of plaintiff in error to strike from the information the words, "and on divers other days and times between the said 4th day of August and the 1st day of September, A. D. 1898." The motion was denied and due exception to the ruling was taken. Evidence was produced tending to prove that the offense charged was committed as alleged. The direct evidence to that effect was given wholly by the girl. The

accused testified in his own behalf, denying in detail her evidence which tended to incriminate him. There was evidence independent of that given by her, tending to show that the accused had opportunity to commit the offense. There was also evidence showing that she was under fourteen years of age at the time the offense was alleged to have been committed; that the accused was forty-eight years of age; that he was a traveling salesman, and was accustomed to visit the home of his parents in the city of Eau Claire, where the girl, Martha Ringe, was employed as a domestic, covering a considerable period of time including the day upon which the offense was alleged to have been committed; that on such visits he was accustomed to lodge at the house of his parents, and that he and the girl at such times occupied adjoining rooms on the second floor, they being the sole occupants of that part of the house in the nighttime; that the girl made no disturbance to speak of at the time she claimed to have been violated; that she did not make any complaint of having been abused for a long time after the alleged commission of the offense, and did not suffer any inconvenience from the abuse complained of at the time thereof, nor thereafter till her condition of pregnancy developed. She gave birth to a child May 26, 1899. She charged plaintiff in error with being the father of the child, testifying that he assaulted her and did the acts alleged against him in the information on the 4th day of August, 1898.

There was evidence by and on behalf of the accused tending to show that he was in the city of St. Paul, Minn., at the time the girl claimed the offense was committed. Proof was made in support of an alibi that the accused was required and accustomed to send daily reports of his whereabouts and doings to his employer, and reports purporting to have been written by him and sent daily for a period including the 4th day of August, 1898, were introduced in evidence. There was also evidence in regard to the running of the railway

trains between the city of Eau Claire and the city of St. Paul, that being introduced for the purpose of showing that it was possible that the accused might have been in St. Paul on the 4th day of August, 1898, and in the city of Eau Claire on the same day at the time or about the time on that day the girl testified that he committed the offense charged. She testified that the accused repeated the offense of the 4th day of August, on the 20th day of August thereafter, and again on the 27th day of that month. The court, in submitting the cause to the jury, required them to find the accused guilty of having committed the offense charged on the 4th day of August, 1898, or not guilty.

A verdict of guilty was rendered, and thereafter, and before judgment, the judge before whom the cause was tried died. Subsequently, and against objection by counsel for the accused, judgment was entered upon the conviction by the court, Hon. JAMES O'NEILL, judge of the circuit court for Clark county, presiding.

For the plaintiff in error there was a brief by *V. W. James,* attorney, and *R. J. MacBride* of counsel, and oral argument by *Mr. James.*

For the defendant in error there was a brief by the *Attor-General,* and oral argument by *R. F. Hamilton,* second assistant attorney general, and by *De Alton S. Thomas.*

The following opinion was filed February 18, 1902:

MARSHALL, J. The plea in bar did not tender any issue of fact as to which there could be, in the nature of things, any controversy to be established by evidence *dehors* the record. All matters of evidence of the facts alleged were a part of the recorded history of the trial. Therefore, the question of whether the special plea should be sustained or overruled was wholly one of law and was properly decided by the court. The jury had no duty to perform in respect thereto whatever. *Jackson v. State,* 91 Wis. 253, 64 N. W. 838; *Campbell v.*

State, 111 Wis. 152, 86 N. W. 855. We do not understand that counsel for plaintiff in error make any contention but that the defense of former jeopardy was properly overruled. The only complaint made is in regard to the manner in which the court discovered the matters of fact upon which the plea turned, that is, that it was done by mere judicial notice of the record, instead of by the finding of a jury. It is by no means certain but that the plea was bad upon its face. It merely alleged that the jury was discharged without the consent of the accused. Looking at the entire plea, the reasonable inference was that the jury were discharged in the exercise of the discretionary power of the court because they were unable to agree. In either event, the question raised by the plea was not only properly tried, but it was properly decided. It is too well understood to be open to reasonable controversy that in the trial of a criminal cause the court may, in the exercise of its sound discretion, discharge a jury and hold the accused for another trial when, after taking a reasonable time to consider the case, they are unable to agree upon a verdict.

The failure of the court to strike from the information the useless words, "and on divers other days and times between the said 4th day of August and the 1st day of September, A. D. 1898," was not prejudicial to the rights of the accused. The words were mere surplusage. The naming of a day certain was essential, and that was satisfied. The prosecution was not limited to proof of an offense of the character charged upon the particular day named. The state was permitted to prove that the offense was committed on any day within the period covered by the statute of limitations, but it was necessary for the prosecution to elect what day would be relied on, at some point in the trial, or for the court to so fence in the charge, since there was evidence of several offenses of the character of the one alleged, and the offense was of such a character that there might have been several. The prosecuting attorney, by the manner in which the trial was conducted, con-

fined the inquiry, as to the offense for which the accused was on trial, to a day certain named in the information, and the jury were restricted to that particular day in considering the case, by the charge of the court. So there is no reasonable ground to claim that the failure of the court to strike the useless words from the information was prejudicial.

The conviction is challenged because, after the special plea was overruled, the accused was not required to plead anew to the information so as to raise an issue for trial on the merits. Such an issue is deemed essential. *Davis v. State,* 38 Wis. 487. But one was formed in this case, and all mere formalities in regard thereto, if there were any, were overlooked and waived by the accused by not objecting to the re-entry as ordered by the court and by going to trial upon the issue thus formed without objection. Undoubtedly the rule is as contended for by counsel for plaintiff in error, that where a plea of not guilty is withdrawn by permission of the court for the purpose of letting in some other plea, it should be re-entered upon such other plea being overruled, before a trial upon the merits. *Hatfield v. State,* 9 Ind. App. 296, 36 N. E. 664; *People v. Monaghan,* 102 Cal. 229, 36 Pac. 511; *Morton v. People,* 47 Ill. 468; *Hensche v. People,* 16 Mich. 46. But it is not necessary, as counsel seem to think, that there should be a formal re-arraignment and plea by the accused, or that he should refuse to plead over in order that the former plea may properly be re-entered by the court. Where the plea is expressly withdrawn for the purpose of enabling the accused to enter a special plea, the reasonable inference is that the case will go to trial upon the merits in the event of such plea being overruled, and in such case the court may properly order the plea of not guilty to be re-entered. *Morton v. People, supra.* If such were not the case, the re-entry of the former plea by the court without objection, and going to trial upon the merits, as was done in this case, would constitute a complete waiver of any irregularity in the matter. A person can

no more keep silent when he ought to speak in a criminal case than in any other, and then insist upon what he assented to by his silence as prejudicial error, where the right to do so is not given by some statutory or constitutional safeguard, plainly indicating that it is not a subject of waiver, or the denial of it plainly prejudicial. The doctrine on that subject is well established. It is stated in the books in this or similar language:

"If, except where some counter doctrine presses with a superior force forbidding, a party has requested or consented to any step taken in the proceedings, or if at the time for him to object thereto he did not, he cannot afterward complain of it, however contrary it was to his constitutional, statutory, or common-law rights." Bishop, New Cr. Proc. § 118.

The accused was not precluded from waiving any irregularity in the entry of his plea of not guilty, if there was any such irregularity, and we say there was none. He had the full benefit of such a plea secured to him by the order of the court. Therefore, all irregularities were waived not only by his own conduct, but by sec. 2829, Stats. 1898, which requires the court, at every stage of an action, to disregard any error or defect in the pleadings or proceedings which does not affect the rights of the adverse party, and not reverse any judgment or allow it to be affected by reason of such error or defect.

Complaint is made because the court admitted evidence of violations of the girl by the accused other than the particular one for which he was on trial. Since, on account of the age of the girl, her attitude in the matter of the commission of the offense at the time thereof was not material, and it appeared that the circumstances were such that had she been over the age of consent the offense would have been fornication, it seems that it was proper to permit proof of other violations of her by the accused, than the one for which he was on trial, as corroborative evidence, under the rule discussed and approved in *Proper v. State,* 85 Wis. 615, 55 N.W. 1035.

The doctrine on the subject laid down in *Comm. v. Merriam,* 14 Pick. 518, was there referred to and approved. "Evidence should be excluded which tends only to the proof of collateral facts. It should be admitted if it has a natural tendency to establish the fact in controversy." Under that rule, in prosecutions for adultery, other adulterous acts between the parties than the one for which the accused is on trial, may properly be given in evidence upon the ground that they tend to corroborate the evidence as to the particular act of adultery charged. In this case it cannot be doubted that the evidence, as regards other acts of intercourse between the accused and the girl, tended to corroborate her evidence as to the particular act alleged, the same as in a case of adulterous intercourse. In that view the evidence was clearly proper under *Proper v. State, supra,* and *McAllister v. State,* 112 Wis. 496, 88 N.W. 212.

The point is made that the conviction is wrong because it rests upon the uncorroborated evidence of the girl. That cannot be sustained for two reasons: First, it is not the law that a jury cannot rightfully find a verdict of guilty of the crime of rape, especially when committed upon a child, on the uncorroborated evidence of the injured party. Second, because counsel is very far from right in the contention that the evidence of the prosecutrix in this case is entirely without corroboration. There was much corroborating evidence of the girl. It does not seem that there is any need to refer to it in detail. The undisputed and indisputable fact that the girl gave birth to a child at a time consistent with her accusation against the plaintiff in error should not be so far overlooked as to say that her evidence is entirely uncorroborated. True, there is much support for the proposition contended for by counsel, that evidence corroborating the prosecutrix is necessary to a conviction in a prosecution for rape, but there are many authorities the other way, and in our judgment they are much more reasonable and safe to be followed. Even

if it were not for that, this court has heretofore decided the question. Any rule, it would seem, should be condemned, which will render conviction of the heinous crime of rape impossible merely because neither the person suffering the direct injury nor the public is able to produce evidence corroborating that of the prosecutrix. Evidence given by the victim of such an alleged outrage, in a prosecution of the alleged guilty party, certainly should be scrutinized with the greatest care—all the care which a person would devote to the most important affairs of life; but it should not be regarded as insufficient as a matter of law to sustain a conviction. As this court said in *Osgood v. State,* 64 Wis. 472, 25 N. W. 529, "The direct and positive testimony of the complaining witness, if believed by the jury, is amply sufficient to support the verdict." The conviction there rested on the uncorroborated evidence of the prosecuting witness, and was sustained. If the rule were not as stated as regards a female over the age of consent, it should apply where the victim is a child under such age. One of the chief reasons for the contrary rule is the danger of a mere act of fornication or adultery being made the basis of a prosecution for the heinous crime of rape. Courts have held, as it would seem, in reason, they must hold, that corroborating evidence of the prosecutrix, where she is under age of consent, is not essential to a conviction of such a violation of her person as is here charged. Female children are not so endangered as that by any mere weakness in the law. *Jones v. State,* 68 Ga. 760; *State v. Lattin,* 29 Conn. 389. In the last case cited there was no confirmation of the child's testimony by evidence of the condition of her person after the commission of the offense, by medical examination or otherwise, nor was there any corroborating evidence by medical testimony, and the verdict of guilty was sustained.

Several criticisms are made of rulings on requests by counsel for the accused for special instructions, and of instruc-

tions given in the general charge. It is not necessary to review all of the criticisms in detail. We are unable to discover any prejudicial error in any of such rulings, or in the general instructions given by the court, except those to which particular reference will be made.

The court said this to the jury: "It is a rule of common sense and sound logic that a party who testifies falsely upon any material question shall not be believed upon any other question, unless his evidence is fully and strongly corroborated." No time need be spent to demonstrate that to be erroneous to a very high degree. It is not the law that a person who testifies falsely as to one material matter in the trial of a cause cannot properly be believed as to any other such matter. A jury may properly believe a witness who has testified upon several matters, as to some of them, though they may believe the testimony false upon others. They have not a right to reject all of a witness's testimony merely because they conclude that he testified falsely as to some material matter. Much less are they bound to do so. If a witness wilfully testifies falsely as to any material matter in the trial of a cause, the jury may properly reject all of his evidence which is not corroborated by some other credible evidence. *Bratt v. Swift,* 99 Wis. 579, 75 N. W. 411; *Miller v. State,* 106 Wis. 156, 81 N. W. 1020. They are not, under such circumstances even, bound to disregard all the witness's testimony. They are merely permitted to do so if, in their judgment, such discredit is, by the wilfully false evidence, cast upon all of his testimony that no credence can, in their judgment, be safely given to any part of it. It is not necessary to prevent the rejection of all of a witness's testimony where some part of it is wilfully false on that ground alone, that the other part be fully and strongly corroborated, as the court put it; it is sufficient if it is corroborated by some credible evidence.

In a case of such serious character as this, where there is plainly room for a jury to come to a conclusion either for or

against the accused, and the case rests, in the main, on the evidence of the two parties who were concerned in the act which is the subject of investigation, and the evidence of each refers to several matters upon which the witness may have testified falsely, though not wilfully so; or, if otherwise, the witness's evidence upon some matters was corroborated by evidence which might reasonably be considered credible, though not up to that high standard of full and strong corroboration given by the learned judge in his instructions, it is easy to be seen how such an erroneous rule of law as that under consideration might of itself move a jury to find a verdict of guilty where otherwise a verdict of not guilty would be found. It seems that the plaintiff in error is entitled to a reversal and to again be permitted to have his cause submitted to a jury.

The jury were further instructed as follows: "The prosecutrix has been corroborated in many respects, as to almost every fact that she testified to." That, as it seems, was a prejudicial invasion of the province of the jury. The most that the court could properly have said on the subject referred to was that there was evidence tending to corroborate the prosecuting witness upon the matters testified to by her. Instructions should not even go that far unless the tendency to corroborate is clear beyond any reasonable controversy. To pass upon the evidence in that regard by saying, in effect, that it fully corroborates other material evidence, is entirely unjustifiable.

The jury were further told in respect to the evidence produced by the accused to sustain his defense of alibi, that it did not necessarily establish beyond question the impossibility of his having committed the crime as charged. We are unable to conclude with reasonable certainty what idea the jury may have got from that instruction. It was capable of being so understood as to be prejudicial. It was not necessary to an acquittal on the strength of the alibi that it should be more than sufficiently established to raise a reasonable

doubt as to whether the plaintiff in error committed the offense charged. Again, whether the alibi was so firmly established as to preclude any reasonable belief that the plaintiff in error was with the prosecutrix at the time she claimed he assaulted her, was one of the disputed questions in the case upon the evidence, and the court should not have said anything liable to be taken in a way to usurp the functions of the jury in regard thereto. We are not unmindful that the language of the court under consideration is capable of a construction which would make it harmonize with correct principles. It is sufficient that the jury may probably have understood it otherwise.

The judgment is questioned because it was pronounced by the court, a different judge presiding than the one who presided on the trial. That point is ruled against plaintiff in error by *Pegalow v. State,* 20 Wis. 61.

There are some assignments of error to which we have not made particular reference, but all have been considered and are overruled except the errors in the charge which have been discussed at length. For such errors the judgment must be reversed and a new trial ordered.

By the Court.—The judgment is reversed and the cause remanded for a new trial, for which purpose the warden of the state prison is directed to deliver the plaintiff in error, *Dell Lanphere,* to the sheriff of Clark county, who is directed to safely keep the said *Dell Lanphere* in his said custody until he is duly discharged therefrom or it is otherwise ordered according to law.

A motion by the plaintiff in error for a rehearing was denied April 22, 1902.

PAGE, Respondent, vs. MCMILLAN and others, Appellants.

April 2—April 22, 1902.

Partition of land: Estoppel.

In the absence of an agreement between the purchasers of land, either before or after the purchase, that it should be conveyed to a corporation thereafter to be organized, one of such purchasers will not be estopped from claiming partition on the ground that he ought to convey his interest to the corporation.

APPEAL from orders of the circuit court for Clark county: CHAS. M. WEBB, Judge. *Affirmed.*

This is an action for partition of certain real estate. The plaintiff and the defendants *John D. McMillan, John Paulus,* and *Lamont E. Brown* each owned an undivided one-quarter interest. The other parties are the wives of the owners. The answer sets up an agreement on the part of the present owners to purchase the property, and to convey it to a corporation thereafter to be organized; that such property was purchased, the corporation was formed, and the defendants executed a deed to it, but plaintiff refused to carry out his part of the agreement. The corporation was not made a party. The defendants set up the same facts by way of counterclaim, and asked that the plaintiff be decreed to carry out his contract. The court found that no such contract was made, either before or after the purchase of the land; that the defendants had not conveyed their interest in the land to the corporation; and that the plaintiff had not done any act in dealing with the property that ought to estop him from claiming partition. He thereupon entered the usual order of partition, and directed a reference as required by the statute. The referee reported that the lands could not be partitioned, and that the interests of the parties would not be promoted by platting the same. Thereupon the court entered an order

directing a sale of the premises. The defendants appeal from both said orders.

For the appellants there was a brief by *J. R. & C. R. Sturdevant,* attorneys, and *Chas. F. Grow,* of counsel, and oral argument by *J. R. Sturdevant.*

For the respondent there was a brief by *S. M. Marsh* and *L. M. Sturdevant,* and oral argument by *Mr. Sturdevant.*

BARDEEN, J. The evidence in this case was considerably in dispute. The trial court had the witnesses before him, and he also had advantages toward determining their credibility, and the weight to be given to the various circumstances detailed in evidence, not possessed by us. In his written opinion the court sets forth his conclusions as follows:

"In the present case the agreement, if made, was not in writing, and it is disputed that one was made. It is evident that the defendants intended that a corporation should be formed, and two of them expressed an unwillingness otherwise to engage in the proposed enterprise. The matter was at some time or times discussed in plaintiff's presence, and there is no evidence that he was particularly averse to the formation of a corporation, although he swears that he heard no such talk until after the purchase from Hiles was completed. He denies unqualifiedly that at any time he agreed to incorporate or to convey his interest to a corporation. It is apparent from all the testimony that the plaintiff was very desirous from the beginning that Marsh, a practical mill man, should have an interest in the enterprise, and should have charge of the operation of the mill, and that he cared very much more about that than as to the character of the proprietorship,—whether a corporation or a copartnership. He had encouraged Marsh to understand from the beginning that the latter should have an interest in the business, and himself understood that such arrangement would be acceptable to the defendants. When the parties met, July 21st, to perfect their business plans, the defendants declined to allow Marsh to become a responsible proprietor, and the plaintiff then and there refused to proceed further for that reason

only. His action at that meeting amounted to a declaration by him that he would not proceed further in the enterprise unless Marsh should be given an opportunity to join it. The evidence, as a whole, fails to prove that the plaintiff at any time understood that the formation of a corporation, and the conveyance to it when formed, were conditions upon which the purchase of the property was made or agreed upon by the parties. Nor does the evidence satisfactorily show that the plaintiff knew or understood on the 21st of July, or at any time before the bringing of this action, that a corporation had been in fact organized. Such being the effect of the evidence in this behalf (without discussing it in considerable detail), it cannot be held that the plaintiff has done any act which precludes or estops him from insisting upon partition of the premises. There was probably no corporation *de facto*, much less a corporation *de jure*, when this action was commenced. No capital stock had been issued or subscribed for, no valid deed by defendants to the corporation had been executed or delivered, and consequently no stock had been, to any extent, paid for. The real estate was assessed to and the taxes thereon were paid by the parties as individuals, while the personal property bought and used in carrying on the business was never attempted to be conveyed to the corporation at any time. It is very probable that the defendants understood that the proposed corporation was not organized in fact, because of the plaintiff's refusal to join and convey his interest to it, and that they positively and publicly asserted their corporate character for the first time when they answered the complaint in this action."

An examination of the evidence confirms every statement made by the trial judge. It is true, there is evidence tending to prove the defendants' contentions, but no such preponderance as will justify us in disturbing the conclusions reached. We do not think the circumstances are such as to warrant the enforcement of an estoppel against plaintiff. The estoppel, to be effectual, must rest upon an agreement to purchase for the specific purpose suggested. *Hunt v. Wright*, 47 N. H. 396. Such agreement need not necessarily have been one which could have been legally enforced in the first instance.

If it had been so far performed on the other side that to permit the plaintiff to repudiate it would of itself be a fraud, he must abide by it in a court of equity. *Martin v. Martin,* 170 Ill. 639, 48 N. E. 924. It being found upon credible evidence, however, that no contract was made, the attempt to organize a corporation, and the alleged conveyance to it of the interests of defendants in the land in question, imposed no legal obligation upon plaintiff. There being no foundation for the estoppel, it cannot be enforced.

By the Court.—The orders are affirmed.

PETERS, Respondent, vs. REICHENBACH, Appellant.

April 2—April 22, 1902.

Deeds: Record as evidence: Seal: Certificate of county surveyor: Ejectment: Possession: Boundaries: Division fences.

1. Where, in order to entitle a deed to be recorded, a certificate thereon must have an official seal affixed, the register's record of such deed is not admissible in evidence under sec. 4156, Stats. 1898, unless it bears some device indicating the existence of such seal upon the original, even though the certificate recites that the seal has been affixed.
2. Under sec. 771, Stats. 1898 (providing that the "certificate of the county surveyor . . . shall be admitted as legal evidence in any court"), an official certificate of the county surveyor declaring the making of the survey therein set forth, is admissible in evidence. The purpose of said section is not merely to give admissibility to certified copies of the official record of surveys.
3. Ejectment can be maintained only by one out of possession.
4. The building of a division fence upon the assumption by both parties that it is upon the true line, and occupation up to it by both parties for less than twenty years, do not constitute a binding location of the line, where there was no dispute or uncertainty as to the correct line, no express agreement that the fence should be regarded as such line, and no circumstances such as should estop either party from insisting upon the true boundary.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Reversed.*

The plaintiff claimed to own the N. W. ¼ of the N. E. ¼ of section 14, township 22, and range 4, in Jackson county. Defendant owned the government subdivisions immediately south of it. There was proof of several surveys of more or less particularity, extending from 1861, but none of them, except the last, by one Keach, having any special relation to the east and west one-eighth section line, dividing plaintiff's and defendant's premises. One of these surveys was made by Adams, county surveyor, in 1883 or 1884, and shortly after that the fence in dispute was built by plaintiff's predecessor in title and by the defendant. It does not appear that the line was specifically located by Adams, but he located other points in the section, and the representative of plaintiff's predecessor (one Crombie), with the aid of another and the participation of the defendant, ran what they supposed to be the true line, and built the present fence thereon, each building half. There is no evidence of any dispute as to the true location of the line, nor of any agreement; apparently, simply a supposition that the line adopted was the true one. It appears that the premises had been separated by an old fence a number of years before, the location of which is not definitely established, but was partly north and partly south of the fence then built. That fence has continued up to the present time, accompanied by occupation, as the line, by both parties. In 1899 the defendant employed a surveyor (Keach) to make a survey, more especially of north and south lines through this section, in the course of which, however, he was obliged to locate the corners and quarter corners of section 14, from all of which the government monuments had disappeared, except the southeast corner of the section. A year later, at the employment of the plaintiff, and with the aid of the county surveyor, he repeated this survey, and located the line between plaintiff's and defendant's premises about four

feet south of the fence which was built about 1884, as above stated. The action is to recover that strip.

The plaintiff's title was deraigned from the government down, except that, with reference to the N. W. ¼ of the N. E. ¼, it involved a deed attempted to be proved by the record thereof in the register's office, purporting to be executed in New York, acknowledged before one Thomas Edward, Jr., as commissioner of deeds for the city of Brooklyn, who did not purport to affix any seal to the acknowledgment; but the record disclosed a certificate by the clerk of Kings county and of the supreme court of the state of New York, satisfying our statute in substance, and closing with the following words: "In testimony whereof, I have hereunto set my hand and affixed the seal of said county and court this 22d day of April, 1886. JOHN M. RANKEN, Clerk." The record bears no scroll or other indication of any seal of this officer. The record of that deed was objected to for that reason.

The correctness of Keach's survey as establishing the true line between the parties was submitted to the jury under instructions, and the jury returned a verdict in favor of the plaintiff, whereupon judgment was entered establishing plaintiff's title in fee simple and right to possession, and for nominal damages against the defendant for withholding the premises, from which judgment the defendant appeals.

For the appellant there was a brief by *L. M. Sturdevant* and *F. J. Reichenbach,* and oral argument by *Mr. Sturdevant.*

G. M. Perry, for the respondent.

DODGE, J. 1. The first assignment of error raises the question of the admissibility in evidence, and the efficiency to establish title when admitted, of the record of a deed of April 20, 1886, which deed is sufficiently described in the statement of facts, as also the objection thereto. The necessity of some device on a copy to indicate the existence of a

seal upon the original of a tax deed was discussed in *Dolan v. Trelevan,* 31 Wis. 147, approved in *Hunt v. Miller,* 101 Wis. 583, 77 N. W. 874; and it was there held, with reference to a copy attached to a pleading, that no such designation was necessary where the deed itself recited, above the signature of the county clerk, whose duty it was to affix the seal, that he had executed the same under the seal of the county board. In *Putney v. Cutler,* 54 Wis. 66, 11 N. W. 437, it was held that a *fac simile* of the county board's seal need not appear as a part of the record of a tax deed in the register's office; but that was held with reference to a record which bore a scroll with the word "Seal," which, from its situation, was apparently ambiguous as to whether it was a private seal of the individual signing, or might indicate the presence of the county board's seal. But in *Hiles v. Atlee,* 90 Wis. 72, 62 N. W. 940, the exact question was before the court,— whether a page in the register's office, purporting to be the record of a tax deed required to be executed under the seal of the county board, was a record, when it did not bear either a *fac simile* of the county board's seal, or any scroll or other mark or statement to indicate that there was a seal on the original, except the recitation above the clerk's signature. It was there held that the county board's seal was an essential part of the deed, and that the absence of anything upon the record to indicate that it was present upon the original was conclusive of one of two propositions,— either that no such seal appeared on the original, or that the pretended record was not a record of the deed. We can discover nothing to distinguish the present case from that. The page from the books of the register of deeds was admissible in evidence only if it was a record of a deed bearing upon the clerk's certificate a seal, and, upon the reasoning of *Hiles v. Atlee,* the conclusion would seem to be inevitable, as in that case, either that the original had no such seal, so that it could not legally

be recorded, or that the page presented was not a record of the deed. The admissibility in evidence of the register's record of a deed is entirely statutory, and depends on sec. 4156, Stats. 1898. Unless it is a record, within the terms of that section, of a deed legally recordable under secs. 2219 and 2232, it is not given admissibility and was improperly received, and, being received over objection, proved nothing. We are therefore constrained to the conclusion that title in the plaintiff to the N. W. ¼ of the N. E. ¼ of section 14 was not established, and that recovery of the possession of any part thereof was erroneous.

Plaintiff in this connection makes some contention that he may recover, notwithstanding he has failed to show paper title, on the strength of his possession; but his complaint distinctly alleges, and the evidence all shows, that neither he nor his predecessors in title have been in possession of the strip in controversy within sixteen years prior to the commencement of the action. The facts were the same at the moment of the commencement of the suit that they had been ever since the disputed fence was built, and, if those facts constituted possession in the plaintiff of the premises described in the judgment, his recovery was improper. Ejectment can be maintained only by one out of possession. *Zander v. Valentine Blatz B. Co.* 95 Wis. 162, 70 N. W. 164.

2. Another assignment of error is predicated upon the admission of the official certificate of the county surveyor, Adams, made April 16, 1884, and declaring the making of the survey therein set forth. Sec. 771, Stats. 1898, provides that the "certificate of the county surveyor . . . shall be admitted as legal evidence in any court." This language is very broad and general. It may, of course, be subject to some necessary limitations; but, to the extent of declaring that which has been done by the county surveyor in his official capacity, its admissibility would seem to be unquestionable.

Some suggestion is made by appellant that its only purpose is to give admissibility to copies of the official records of survey upon the certificate of the county surveyor; but this construction is entirely foreign to the language used, and would be an entirely unwarranted modification of what the legislature expressed. We conclude that the certificate in question was properly admitted.

3. Another assignment of error is predicated upon the refusal of the court to direct a verdict for the defendant. Under this assignment it is argued that the undisputed evidence established an agreed location of the fence built in 1883 or 1884, and occupation with reference thereto for so long a period as to make it binding upon the parties. The effect of the building of a fence by the mutual consent of the owners on each side, and occupation with reference to that fence, has been subject of comment in numerous cases in this court, but without laying down very definitely just what is that effect. Some lines, however, are pretty well drawn. Thus, it is established that the building of a fence as a division line, if followed by undisturbed possession by both parties for more than twenty years, does not refute, but, rather, tends to establish, the adverse character of the holding, so that, if not overcome by other evidence, the statutory bar will establish ownership on each side of it, and it thereby becomes the true dividing line of ownership. *Bader v. Zeise,* 44 Wis. 96, 102; *Donahue v. Thompson,* 60 Wis. 500, 19 N. W. 520; *Hacker v. Horlemus,* 69 Wis. 280, 34 N. W. 125; *Wollman v. Ruehle,* 100 Wis. 31, 75 N. W. 425; *S. C.* 104 Wis. 603, 80 N. W. 919. On the other hand, the general rule has been stated that a location by the parties of the line between their holdings, with the intention of making it the true line, and followed by long acquiescence, will be binding. There is no case in Wisconsin in which those facts alone have been held sufficient, unless the occupation has extended over the

statutory period of twenty years. In *Hartung v. Witte,* 59 Wis. 285, 298, 18 N. W. 175, 180, it is said:

"There must be an *uncertainty* as to the true line, and some question, dispute, or controversy about it which can be settled by such an agreement or acquiescence."

Again:

" 'There must be a dispute about the true boundary.' Tyler, Bound. 333. Where there is an agreement or acquiescence in a wrong boundary, when the true boundary can be ascertained from the deed, it is treated both in law and equity as a *mistake,* and neither party is estopped from claiming to the true line."

This limitation received some reference in *Pickett v. Nelson,* 71 Wis. 542, 546, 37 N. W. 836, 837, where the court said:

"We do not wish to be understood, however, as holding that parties can only bind themselves, in such cases of disputed, uncertain, or unascertained location, by express contract. On the contrary, we think that where such location is made by the parties concerned, with the obvious intention of making it the permanent line between them, and the same is continued by long acquiescence and recognition in the making of permanent improvements, it will be binding upon such parties without any formal agreement. . . . In other words, the conclusiveness of such location may, in certain cases, rest upon the doctrine of estoppel *in pais,* rather than upon contract."

In the same case, on a second appeal (79 Wis. 9, 47 N. W. 936), a finding of fact that the line was not in dispute or uncertain deprived of any effect the mere mutual building of a fence as an agreed and adopted line, though followed by many, but less than twenty, years of occupation with reference thereto.

It would seem from these cases in our own court that appellant's contention cannot be sustained. The occupation was less than twenty years. There is no evidence of any express agreement. The fence, obviously, was built on the assump-

tion by both parties that they had found the correct line. There is no evidence of any dispute or disagreement as to the location of the line, nor of any uncertainty then supposed to exist; nor is there anything of the circumstances mentioned in *Pickett v. Nelson,* 71 Wis. 542, 37 N. W. 836, to estop either party from insisting on his true boundary, for nothing appears to have been done in reliance upon the correctness of that fence line, except to mutually cultivate up to it for sixteen or seventeen years after it was built.

4. But as a further ground for direction of a verdict, and also for a motion for a new trial, the appellant contends strenuously that there was no evidence to go to the jury of the correctness of the survey made by the surveyor Keach in 1899, and again at the employment of the plaintiff just before the commencement of this suit. We cannot feel justified in reviewing this evidence. We have examined it carefully, and we have no hesitation in saying that there is evidence sufficient to carry the question of its accuracy to the jury. Whether that evidence is contradicted by facts and circumstances testified to by other witnesses is not material to that conclusion. The surveyor explained at length his methods of ascertaining and determining the location of the several points in that section, and, while they may have justified more or less approach to certainty, they at least presented to the jury the question of the correctness of his conclusions; and we are unable to say either that the court erred in permitting the question to go to the jury, or abused his discretion in refusing to set aside their decision.

By reason of the insufficiency of the record of the deed of 1886, discussed under the first division of this opinion, we must hold that the judgment is erroneous in so far as it awards plaintiff title or possession of any part of the N. W. ¼ of the N. E. ¼ of section 14; and, as to the portion of that one-eighth section described in the complaint, judgment should have gone for the defendant. The rest of the judg-

ment seems to be without error. The litigation involves only trifling value, and ought not to be protracted. To avert that, we shall give the parties opportunity to treat as conclusive the trial already had.

By the Court.—Judgment reversed, and cause remanded for a new trial, but with the option to plaintiff to avoid such new trial by electing in writing, within thirty days after *remittitur* is filed, to take judgment for only that portion of the disputed premises contained in the N. E. ¼ of the N. W. ¼ of section 14, in township 22 N., and range 4 W. If so modified, it shall then stand affirmed. Appellant to recover costs in this court.

BOLEMAN, Respondent, vs. CITIZENS' LOAN & BUILDING ASSOCIATION, Appellant.

April 2—April 22, 1902.

Building and loan associations: Loans, to whom made: Estoppel: Effect of default in payment: Variance between contract and statute: Bidding for loans: Fixed premiums: Management by directors: Usury, who may plead: Quitclaim purchaser.

1. Where a building and loan association has no right to loan money except to members, an application for a loan by a non-member, the making of the loan, and the issue of a certificate of stock to him, must be considered as parts of one transaction, making him a member, and neither he nor an assignee of the stock can be heard to question the regularity of the transaction.
2. Although sec. 2011, S. & B. Ann. Stats., provided that in case of default for *six months* in payments on a loan from a building and loan association the whole amount might be collected, a provision in the bond given by a borrower, that upon default in payments for *three months* the whole principal should become due, did not affect the essence of the loan and is immaterial in an action to redeem from the mortgage, where there is no attempt to enforce such provision. [Whether the parties

might legally contract for a period different from that named in the statute, not determined.]

3. Under sec. 2011, S. & B. Ann. Stats. (providing that the by-laws of every building and loan association should fix the time of holding periodical meetings at which the money in the treasury should be offered for loan in open meeting, and that the stockholder who should bid the highest premium for a loan should be entitled thereto, etc.), the meetings at which such money should be offered might be open meetings of the board of directors where any or all stockholders might be present, and the by-laws might authorize bids to be made in writing, filed with the secretary, by stockholders not present at the meeting.

4. Where no fixed rate of premium had been adopted by the directors of a building and loan association, the facts that a great majority of loans were made at a certain rate of premium, and that the secretary had advised applicants that such rate would probably mature their shares in a given time, do not show that an arbitrary standard of rates had been fixed.

5. The evidence in this case (showing among other things that the business of loaning the moneys of a building and loan association was conducted, not by the members generally, but by the board of fifteen directors; that there were two classes of members,—borrowers and nonborrowers; and that the power of management was in the board of directors) is *held* not to sustain a finding of the trial court that the plan of the association was merely to loan money at high rates under that guise in order to evade the law and avoid the penalties of usury.

6. Dues on his stock, paid monthly by a borrower from a building and loan association, do not reduce the principal of the loan so as to render interest paid upon the whole amount usurious, where by the contract such dues are not to be applied on the loan until the stock reaches its par value.

7. Under sec. 2013, S. & B. Ann. Stats., if the interest reserved by the contract was within the legal rate, the fact that the interest and premium payments together exceeded that rate did not make the transaction usurious.

[8. Whether, under a usury statute which only prevents recovery of interest when the proper defense is made, and requires the person setting up such defense to prove a tender of the principal sum, a mere quitclaim purchaser of premises mortgaged to secure the usurious contract may urge the defense of usury when the mortgagor has waived that right by not urging it, not determined. *Ludington v. Harris*, 21 Wis. 239, distinguished.]

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

The defendant is a building and loan association organized under the laws of this state. In March, 1894, one Zach Bullman was the owner of a house and lot in the city of Eau Claire, upon which he desired to obtain a loan of $500. He applied to defendant's secretary for such loan, and after some conversation signed a written application, setting out a description of the property, and which authorized the secretary to make a bid of fifty-two cents per share for precedence in securing a loan. This application was submitted to a meeting of defendant's board of directors held March 6, 1894, and his bid for a loan, being the highest, was accepted. On March 9th, he executed a bond and mortgage to the defendant, and the latter part of that month the money was paid over, less certain fees for membership and examination of title, together with a certificate of five shares of stock in the defendant association. The bond required him to pay the sum of $7.50 on the first Tuesday of each month, commencing in April, 1894, and to continue such payments until the amount of dues and the dividends credited on his stock should equal the amount of his loan. The amount paid each month was to be applied as follows: (1) To the payment of fines and assessments; (2) to the payment of the premium for precedence, amounting to $2.60 per month; (3) to the payment of interest on his loan, amounting to $2.60 per month; (4) the balance of said payments was to be credited as due on his stock. The bond also provided that, upon default in payments for three months, the whole principal should become due, and might be enforced by foreclosure proceedings. A similar provision was contained in the mortgage. Bullman made one payment in April, and no more. On April 20, 1895, he executed a quitclaim deed of the mortgaged property to plaintiff, *Carrie Belle Boleman,* his sister, and assigned to her his certificate of stock in the defendant association. Prior

to this time, plaintiff had made several payments to the association. Thereafter plaintiff continued payments at irregular intervals until September 6, 1900, the total payments being $500. In March, 1900, plaintiff offered to surrender her stock and pay defendant $226.13 for a release of the mortgage, which was refused. In October, 1900, she commenced this action for an accounting, and to be allowed to redeem the mortgaged premises upon the payment of any balance due defendant. In her complaint she set out the facts aforesaid, and alleged that defendant, by resolution, had adopted a fixed sum of fifty-two cents per share that each borrower should pay for precedence in securing a loan, and that it had also determined that there should be no competitive bids in open meetings for loans, and that the loan in question had been made to one not a member and upon the basis stated.

The answer admitted many of the formal allegations of the complaint; set out the payments made, the amount due, and an offer to satisfy the mortgage upon payment of the balance due. It also alleged that plaintiff agreed to assume the mortgage when she purchased from her brother.

The court found the facts as above narrated in regard to the application for a loan, the execution of the bond and mortgage, the issue of the stock, and the payments made. He also found that plaintiff did not assume or agree to pay the mortgage debt; that defendant never made any claim for fines prior to suit; and that its by-laws had only been adopted by the board of directors, and not by the stockholders. Zach Bullman was not given an opportunity to bid for precedence for a loan at an open meeting of members of the association, but the practice was to receive no bids except such as were in writing and submitted through the secretary, and such bids were acted on by the board of directors, and not by the stockholders. Finding 19 was as follows:

"(19) From the date of its organization to the time subsequent to the making of this loan to Zach Bullman the de-

fendant followed a carefully prepared plan of operations, of which the following were features, to wit: To take the control of its entire loaning business out of the hands of the members generally, and transfer it to a board of directors; to create two distinct classes of members, whose interests should be antagonistic, namely, a lending class and a borrowing class; to put all real power into the hands of a board of directors; to make loans of the funds of the lending or investing class for the most part to persons who should not be at the time of making bids for precedence members, and who could not be expected, from the complicated character of the defendant's organization and plan of doing business, to understand, and who should not understand, the contracts for loans which they were making; and to evade the statutory requirements for competitive bidding in open meetings of the members by subscribing therefor in actual practice such a written bid as was made by Zach Bullman to be submitted through the secretary, as said Zach Bullman's bid was submitted, to the board of directors, to the end and for the purpose of exacting from the said borrowing class, for the use of the defendant, and for the benefit of said lending class, a higher rate of interest than that of ten per cent. per annum; and that it was part of the said plan of said defendant, and of its board of directors, to avoid generally a real compliance with said statute of Wisconsin under which it was organized, and to evade the essential requirements of said statutes, and the whole spirit thereof, and to use the same as a cover for exacting usurious rates of interest from such persons as should obtain loans from said association, and that it made the said contract with Zach Bullman in pursuance of said general plan and for the said purposes."

The court's conclusions of law were: (1) The contract between Zach Bullman and defendant was unlawful and usurious, because his bid for precedence was made when he was not a member, and the contract required him to pay more than ten per cent. interest. (2) Because no opportunity was given Bullman to bid in an open meeting of the association. (3) Because defendant's plan of conducting its business was to evade the law and to secure a greater rate of interest than

the statute provided. (4) Because the contract permitted defendant to foreclose in case of a default of three months, instead of six, as provided by the statute. (5) "The contract between the said Zach Bullman and the defendant was unlawful and usurious, without regard to any of the grounds upon which it has heretofore been by me found to be usurious, for the reason that the statute under which the defendant was organized does not permit it to charge a rate of interest as interest on the debt itself exceeding ten per cent. per annum, while by this contract it is expressly stipulated that the mortgagor shall pay, as interest, the sum of fifty-two cents per share per month from the date of making the contract until the entire indebtedness is extinguished. The rate of interest so charged amounts to 6 24-100 per cent. per annum on the original debt, but as it is contemplated by the contract that the principal sum shall be diminished at the rate of $2.30 per month until it is all paid, the average amount upon which Zach Bullman was to pay interest was only $250, and the agreement to pay $2.60 a month, or $31.20 a year, was an express agreement to pay interest at the rate of 12 48-100 per cent. per annum."

The judgment directed a satisfaction of the mortgage, and that defendant pay the costs of the action. It contained no provision regarding a surrender of plaintiff's stock. The defendant appeals from the judgment.

For the appellant there was a brief by *M. B. Hubbard* and *A. H. Shoemaker,* and oral argument by *Mr. Shoemaker.* They argued, among other things, that the plaintiff is estopped from claiming that her grantor was not a member of the association or a stockholder therein at the time the loan was made to him by it. *Ohio B. Asso. v. Leyden,* 1 Weekly L. Bul. 126; *Manship v. New South B. & L. Asso.* 110 Fed. 854; *Central B. & L. Asso. v. Lampson,* 60 Minn. 422, 62 N. W. 544; *Phelps v. Am. S. & L. Asso.* 121 Mich. 343, 80 N. W. 120; *Poock v. Lafayette B. Asso.* 71 Ind. 357; *How-*

ard Mut. L. & F. Asso. v. McIntyre, 85 Mass. 571; *Spear v. Crawford,* 14 Wend. 20; *Reynolds v. Georgia State B. & L. Asso.* 102 Ga. 126, 29 S. E. 187; *Concordia S. & A. Asso. v. Read,* 93 N. Y. 474; *Bates v. Equitable B. & L. Soc.* 65 Ill. App. 529; *Butler University v. Scoonover,* 114 Ind. 381; *Chase v. Merrimac Bank,* 19 Pick. 564; *Natchez B. & L. Asso. v. Shields,* 71 Miss. 630; *Hammerslough v. Kansas B., L. & S. Asso.* 79 Mo. 80; *City B. & L. Co. v. Fatty,* 1 Abb. Dec. 347. A grantee cannot set up usury in a mortgage he has assumed. *Dewolf v. Johnson,* 10 Wheat. 367; *Ritter v. Phillips,* 53 N. Y. 586; *Cope v. Wheeler,* 41 N. Y. 303; *Barthet v. Elias,* 2 Abb. N. C. 364; *Sands v. Church,* 152 N. Y. 174; *Frost v. Shaw,* 10 Iowa, 491; *Hartley v. Harrison,* 24 N. Y. 170; *Bearce v. Barstow,* 9 Mass. 45; *Post v. Dart,* 8 Paige, 641; *Ferris v. Crawford,* 2 Denio, 598; *Morris v. Floyd,* 5 Barb. 130; *Cole v. Savage,* 10 Paige, 591.

L. A. Doolittle, for the respondent, contended, *inter alia,* that the contract under consideration in this case was usurious because the bid made by Zach Bullman, which was the beginning of the contract and which bound him to go on and take the loan when his proposition was accepted, was obtained from him and made when he was not a member of the defendant association. *People's B., L. & S. Asso. v. Rising* (Tex.), 34 S. W. 147; *Nat L. & I. Co. v. Stone* (Tex.), 46 S. W. 69; *Crenshaw v. Hedrick,* 47 S. W. 71, 19 Tex. Civ. App. 52; *Building & L. Asso. v. Griffin,* 39 S. W. 656, 90 Tex. Sup. Ct. 480; *Meyer v. Chattanooga S. & B. Asso.* (Tenn.), 48 S. W. 105; Endlich, Building Associations, § 409; *Cotton States B. Co. v. Reily* (Tex.), 50 S. W. 961; *White v. Williams,* 90 Md. 719, 45 Atl. 1001; *Fidelity S. Asso. v. Shea* (Idaho), 55 Pac. 1022. The contract was usurious because Zach Bullman was given no opportunity to bid for precedence in loaning in an open meeting of the stockholders. Sec. 2011, S. & B. Ann. Stats. 4 Am. & Eng. Ency. of Law (2d ed.), 1074; 5 id. 88, 89; *Pfeister v. Wheeling B.*

Asso. 19 W. Va. 684; *Bates v. People's S. & L. Asso.* 42 Ohio St. 655; *Stiles's Appeal,* 95 Pa. St. 122; *State ex rel. Att'y Gen. v. Greenville B. & S. Asso.* 29 Ohio St. 92; *Shannon v. Howard M. B. Asso.* 36 Md. 383; *Wilcoxen v. Smith,* 107 Iowa, 555, 78 N. W. 217; *Post v. Mechanics' B. & L. Asso.* 97 Tenn. 408, 37 S. W. 216; *Myers v. Alpena L. & B. Asso.* 117 Mich. 389, 75 N. W. 944; *Douglass v. Kananaugh,* 90 Fed. 373; *Mechanics & W. M. Mut. S. B. & B. Asso. v. Wilcox,* 24 Conn. 147; *Capitol Hill B. Asso. v. Hilton,* 1 Mackey, 107; *Brown v. Archer,* 62 Mo. App. 277; *Southern B. & L. Asso. v. Riggle,* 4 Pa. Dist. 617; *McCauley v. Workingman's B. & S. Asso.* 97 Tenn. 421, 37 S. W. 212, 35 L. R. A. 244; *Trowbridge v. Hamilton,* 52 Pac. 328, 18 Wash. 686; *Price v. Empire L. Asso.* 75 Mo. App. 551; *Sappington v. Aetna L. Co.* 76 Mo. App. 242; *Moore v. Cameron B. & L. Asso.* 74 Mo. App. 468; *Iowa S. & L. Asso. v. Heidt,* 77 N. W. 1050, 107 Iowa, 297; *Parker v. Fulton L. & B. Asso.* 46 Ga. 166; *Shannon v. Dunn,* 43 N. H. 194; *Melville v. Am. B. B. Asso.* 33 Barb. 103; *Anthracite B. & L. Asso. v. Lyons,* 2 Kulp, 409; *Jackson v. Cassidy,* 68 Tex. 282, 4 S. W. 541; *Lincoln B. & S. Asso. v. Graham,* 7 Neb. 173; *Meroney v. Atlanta B. & L. Asso.* 116 N. C. 882, 21 S. E. 924, 47 Am. St. 841; *Mills v. Salisbury B. & L. Asso.* 75 N. C. 292; *Vann v. Fayetteville B. & L. Asso.* 75 N. C. 494; *City Loan Co. v. Cheney,* 61 Minn. 83, 63 N. W. 250.

BARDEEN, J. In so far as the findings and judgment depend upon irregularities or informalities in the proceedings leading up to Bullman's subscription for stock and his application for a loan, they have no basis to rest upon. When he made his application for a loan, he was chargeable with knowledge that the defendant had no right to loan money except to members. Such application for a loan was virtually an application for membership in the corporation. The application, the loan, and the issue of stock must be con-

sidered as one transaction, the result of which made him a member of the corporation; and under well-recognized principles neither Bullman nor the assignee of his stock can be heard to question the regularity of that transaction. *Leahy v. Nat. B. & L. Asso.* 100 Wis. 555, 76 N. W. 625. A person may become a member for the mere purpose and at the time of obtaining a loan. Endlich, Bldg. Asso. § 55; *Freeman v. Ottawa B., H. & S. Asso.* 114 Ill. 182, 28 N. E. 611. The mere circumstance that at the instant he signed the application for a loan he was not a member of the association is of no significance. Unless the loan itself violated some provision of the statute, it cannot now be impeached. Having accepted the loan and the stock issued to him, he cannot now be heard to say that he dealt with the association as a stranger, and his assignee certainly possesses no better right.

Neither did the fact that the bond and mortgage provided that in case of default in payments stipulated for a period of three months the whole principal debt should forthwith become due and payable render the loan usurious and void. It is true that the statute (sec. 2011, S. & B. Ann. Stats.) provides that such default shall exist for a period of six months, and that after such period has expired payment of the whole principal and interest, without deduction of any premium paid, or interest thereon, may be enforced by proceedings on the member's securities according to law. The contract in question runs contrary to the statute, but the validity of that feature of it is not here in issue. The defendant is not here seeking to enforce it. It in no way affects the real essence of the loan. If beyond the power of the corporation to make, the plaintiff is in no position to take advantage of it. The law does not, in terms, prohibit the parties from contracting for a shorter period. Whether the parties might legally contract for a different period than that named in the statute, we need not determine. It is enough to say

that the question is not here, and the attempt of the court to rest its conclusion upon it was wholly unwarranted. See *Leahy v. Nat. B. & L. Asso., supra.*

Another reason why the court believed the contract was unlawful and usurious was that Bullman was not given an opportunity to bid at an open meeting of the members of the association. Sec. 2011 of the statute aforesaid, among other things, provides that the by-laws of every such corporation shall fix the time of holding periodical meetings at which the money in the treasury shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the loan should be entitled to a loan of at least the full amount of a share for each share of stock held by him, if the association is in funds, upon giving good and ample security. The premium bid may be by a certain sum or percentage on the loan, to be deducted in advance, or may be by certain periodical payments during the existence of such loan, according as the by-laws may prescribe.

Under the articles of organization of defendant, power was given the board of directors to adopt such by-laws, not inconsistent with the articles, as they might deem necessary. The by-laws so adopted provided that the meetings of the stockholders should be held annually on the second Tuesday of June of each year. Regular meetings of the board of directors were to be held on Tuesday evening of each week for the purpose of loaning the funds of the association, and such meetings were to be open to the stockholders. At each such meeting precedence in borrowing money on hand was to be sold at auction to the highest bidder who would pay the highest monthly premium therefor, such premiums to be paid monthly during the continuance of the loan. Any member not desiring to be present might leave written authority with the secretary to bid for him, but no such bid was to be made unless the same was higher than that of any person present, or until all such bidders were satisfied. Payments

to the association on loans were to be made as set out in the statement, and continued until the dues paid on the stock, together with the dividends credited thereon, should equal the amount of the loan, at which time the stock was to be canceled and the mortgage released. Dividends were to be declared in January and July of each year, *pro rata* on the value of the stock.

We have already held that neither Bullman nor plaintiff is in a position to raise the question of want of membership at the time the application for a loan was made. Bullman's bid for a loan was made in writing. It was submitted at a regular open meeting of the board of directors. There is nothing in the statute requiring the person desiring a loan to be present at the meeting and make his bid in person. The by-laws expressly authorize a written bid. We see no reason why every purpose of the law is not met by a written bid filed with the secretary. *Hughes v. Farmers' S. & B. & L. Asso.* 46 S. W. 362. Counsel for the plaintiff lay some stress upon the fact that the bid was not presented at a meeting of all the stockholders. We do not think the statute contemplates that the stockholders should meet every time money is put up at auction. Under its articles of incorporation the business of the association was given to the control of its board of directors, who were also given power to adopt proper by-laws. One of their duties was to loan the surplus money. The by-laws provided that they should hold stated meetings, open to the stockholders, at which the money to be loaned was to be put up at auction. The members were bound to take notice of this provision, and if a loan was desired they might appear in person or submit their written bids. Open meetings of the board of directors, where any or all stockholders might be present, answer every demand of the statute. It was the natural and logical way of conducting their business, and surely does not contravene any provision of the statute.

Along this line is the further suggestion that a fixed rate of premium was charged, which, under a numerous line of decisions, made the contract usurious. The evidence shows that a great majority of the loans made were upon a bid of fifty-two cents per share per month as premium. This is accounted for by the testimony of the secretary, who says that he advised applicants that that rate, with the interest charged, would probably mature their stock in from seven and one-half to nine years; that he had been advised by an actuary versed in business of this kind that such were the results generally, and so many of the bids were put in on that basis. He also says that no rate had ever been fixed by the directors, and that every applicant was free to make whatever bid he chose. Such being the uncontradicted proof, there is no ground for saying that an arbitrary standard of rates had been fixed, so as to bring the case within the authorities cited. It is worthy of note that corporations of this kind, organized under our present statutes, are authorized to adopt fixed rates of premium and interest on loans. This was evidently done in deference to the fact that horizontal or uniform premiums, based upon a just profit to the association, have been demonstrated in actual experience as being more to the advantage of the association, and as of more fairness to the members desiring loans, than the other plan. Thompson, Bldg. Asso. § 188, p. 377; *Manship v. New South B. & L. Asso.* 110 Fed. 845. As said in the head-note of the case last cited,

"Uniform premiums are in fact more equitable, as between the borrowing members, than those determined in each case by the necessities of the borrower."

An appreciation of this fact, and a little closer reading of the case of *Bates v. People's S. & L. Asso.* 42 Ohio St. 655, upon which many of the decisions are based, would have prevented much of the confusion existing in the authorities and great injustice to associations of this kind. Judge NILES in

Manship v. New South B. & L. Asso., supra, clearly points out the misleading statements in Endlich, Bldg. Asso. § 409, and shows how the courts have been misled by them. It now being the policy of our law to permit premiums to be fixed by associations in this state, we do not feel bound to follow the extreme cases found in other states, holding contracts made on that basis invalid.

Finding 19, copied in the statement, is most striking in its facts. The court sets out certain features of the plan adopted by defendant in conducting its business, as being so vicious as to warrant the conclusion that it was merely seeking to loan money at high rates of interest, under the guise of a building and loan association, to avoid the penalty of usury. His first indictment is that it took the business of loaning out of the hands of the members generally, and vested it in the board of directors. This was a plan directly authorized by law and its articles of incorporation, and one approved by the experience and observation of any one familiar with the conduct of corporate affairs. The chief business of the corporation was to collect and loan money. Its entire profits grew out of fines for default in stock payments, and from loans. It would seem hardly necessary to argue that the business could best be done by a few chosen for that purpose, who were responsible to the body of members for their acts. His next serious charge is that they created two distinct classes of members,—a lending class and a borrowing class, whose interests were antagonistic. We do not quite appreciate the drift of this part of his finding. There never was and never can be an association of this kind that does not have the two classes of members,—the borrower and the nonborrower. Their interests are not antagonistic in any legal sense. One is an investor and the other sustains the dual relation of investor and borrower. Both are equally interested in the prosperity of the association. The failure of courts to appreciate the fact that the borrower becomes an in-

vestor to the amount that he pays on his stock has led to very much of the confusion in the case. Another complaint against the association was that it "put all real power into the hands of a board of directors." This was strictly according to law. Every corporation must have a managing body, and usually the smaller the number the better the management. This association was required to have a board of fifteen directors, chosen from the stockholders. Certainly the power of management was sufficiently disseminated to meet all practical demands. A final sweeping charge is that it was the policy to lend funds to persons not members, and generally to evade legal requirements as to bidding, and exact greater interest on loans than the law permitted. We have read the evidence with care, and are unable to find anything therein to support this conclusion. There is no proof of a single instance of a loan to one who was not a member, or who did not become a member at the time the loan was made. There is no proof of any arbitrary action on the part of the board of directors, or any evasion of the by-laws, to the oppression of members. As already suggested, the fact that many of the bids for money were at the same rate was not suggestive of oppression, or violative of the fundamental idea of such association. So long as rates of premiums were not arbitrarily fixed, and loans refused because the prescribed standard was not reached by the bid submitted, certainly no injury was done to the borrower. The fact that most borrowers come in on an equal footing does not tend to impeach the integrity of the management.

The fifth conclusion of law quoted in the statement indicates that the court labored under a misapprehension of the nature of the contract in question. The court says that it was "contemplated by the contract that the principal shall be diminished at the rate of $2.30 per month until it is all paid, the average amount upon which Zach Bullman was to pay interest was only $250, and the agreement to pay $2.60 a

month, or $31.20 a year, was an express agreement to pay interest at the rate of 12 48-100 per cent. per annum." The contract in question warrants no such conclusion. There is not a word in it that contemplates that dues on stock should be applied on the loan at any time before the stock reached its par value. The contrary idea is apparent from the very nature of the transaction, and from the very terms of the contract. All payments made by the borrower for interest and premiums went to the general credit of all stockholders, including the borrower. All payments on stock dues went to the credit of the paying stockholder, and each year as the total amount was increased, the dividends apportioned to each share increased, so that as the period of maturity approached, stock dividends were correspondingly larger, and shortened the time for which interest payments were to be made. By the terms of the by-laws and the contract itself, when such payments and the dividends apportioned thereto equaled the amount of the loan, or in other words when the stock reached par, it was to be applied on the loan and the stock was to be canceled and the mortgage released. The fact that the interest and premium payments together exceeded the rate of interest allowed under the general statute did not make the transaction usurious, because sec. 2013 says, "No premiums, fines or interest on such premiums that may accrue to any such corporation under the provisions of this chapter shall be deemed usurious." The interest reserved by the contract was within the legal rate, and the transaction cannot be deemed usurious unless the premium payments are tacked thereto. This, the statute says, shall not be done.

Defendant raises the question of plaintiff's right to contest the validity of the mortgage in suit. It is claimed that she purchased the premises and assumed the mortgage. The circumstances certainly point that way. On her examination before trial, plaintiff at one time testified that she was to

pay the mortgage, but later in her testimony took back the statement, claiming it was inadvertently made while she had lost her self-control and was weeping. The conclusions reached on other branches of the case render it unnecessary to discuss this situation. Even if it be conceded that she stands as a mere volunteer under her quitclaim, and that the mortgage was in fact tainted with usury, there is some question whether plaintiff could interpose such claim. *Ludington v. Harris,* 21 Wis. 239, which is claimed establishes her right to do so, was decided at a time when the law declared the contract made in defiance of the statute void. The court then speaks of the contract in suit as being void for usury. At the time the contract in suit was made, if affected by usury, it was enforceable, except as to interest. In *Bensley v. Homier,* 42 Wis. 631, this court denied the right of a junior creditor to make the defense of usury in a suit to foreclose a mortgage in which the mortgagor did not defend. Without referring to the *Ludington Case,* the following language was used:

"It is difficult to perceive why the defense given by the statute to the borrower, for his protection against oppression, and which he may waive at his pleasure, should be extended to any one but himself or his representatives. . . . The courts have generally held the defense of usury personal to the debtor, his privies in blood or estate, and privies to the contract; and that strangers to a contract cannot impeach it for usury."

Where the contract is declared void by the statute, there is good ground for saying that any one whose property is affected by it may take advantage of the fact. But when, as now, the statute only prevents a recovery of interest when the proper defense is made, and requires the person who desires to set up the defense of usury to prove a tender of the principal sum, there is some reason for saying that a mere quitclaim purchaser of the premises affected is not in a position to urge a defense which the borrower has waived by not mak-

ing it. We leave the question without decision, as not being necessary under the conclusions already stated in the case.

It follows from what has been said that plaintiff is not entitled to the relief granted her in the court below. The right of defendant to charge up fines against delinquent members is expressly given by the by-laws. Plaintiff, not having made payments according to the requirements, is in no position to contend against their enforcement. Inasmuch as the statute in force when the loan was made permitted the borrower to repay his loan at any time, and as the relations between the parties have become somewhat strained, we have deemed it best to remand the case with directions to enter a judgment permitting plaintiff to redeem the premises and sever her relations with the association, or dismiss the case, at her option. The association has heretofore offered to apply the amount paid as interest, premiums, and stock dues on the mortgage debt, and to release the mortgage upon payment of the balance due. Upon the assumption that such offer is still good, judgment may be entered permitting plaintiff to free the premises from the mortgage by paying to defendant the amount actually due on her loan for interest, premiums, and fines, according to the by-laws, at the time of the entry of judgment, with costs of suit, less the amount paid to the association and dividends declared on her stock.. Or, to state it otherwise, plaintiff shall comply with the terms of her contract to the date of the entry of judgment, and shall receive credit for what she has already paid the association, with dividends, if she desires to redeem. The payment of the balance due, with costs, will entitle her to a release of the mortgage. In such an event her stock should be surrendered for cancellation. In case plaintiff shall not elect to enter the judgment as suggested, the action will be dismissed.

By the Court.—The judgment is reversed, and the cause is remanded for further proceedings as directed in the opinion.

BUCHAN and another, Appellants, vs. NELSON, Respondent.

April 2—April 22, 1902.

Judgment: Vacating: Inadvertence: Laches.

An application under sec. 2832, Stats. 1898, to set aside a judgment dismissing an action with costs, made nearly four years after the entry of the judgment and nearly three years after defendant's attorneys had collected from plaintiffs a part of the costs, is *held* to have been properly denied, although the judgment was obtained through plaintiffs' inadvertence, surprise, or excusable neglect, and their unopposed affidavits stated that they did not know of the judgment until about five months before making the application.

APPEAL from an order of the circuit court for Kenosha county: FRANK M. FISH, Circuit Judge. *Affirmed.*

The appeal is from an order refusing to set aside a judgment dismissing the above-entitled action. The judgment was rendered April 3, 1897. The petition for the vacation thereof was made March 14, 1901. The ground for the relief sought is as follows:

The case was commenced in justice's court. It was carried to the circuit court for Kenosha county by appeal from a judgment rendered in favor of plaintiffs. At the March term of said court for 1897, the cause being on the calendar for trial, counsel for plaintiffs moved for a dismissal of the appeal. Time was given defendant's attorneys to prepare to argue the motion. A case being on trial which plaintiffs' attorney supposed would take several days to conclude, he absented himself from the court, depending on a promise given by defendant's attorneys to let him know when the cause could be heard. During the waiting period plaintiffs' attorney was taken sick and thereby rendered unable to attend to any business. His disability continued till the latter part of September, 1900. When the cause was reached for trial plaintiffs' attorney was not present. Plaintiffs relied

wholly on their attorney to protect their interests and were ignorant of his disability. The result was a judgment against them, dismissing the action. Thereafter costs were taxed at $49.17 and inserted in the judgment, notice of such taxation being sent to plaintiffs' attorney by mail. He was then sick, as before stated, and was absent from the state. He neither knew of, nor was he in a condition to attend to, plaintiffs' interests. April 30, 1898, upon plaintiffs being threatened with legal proceedings, and without knowing their rights in the matter, they gave defendant's attorneys a check for $37.50. They did not know of the judgment against them when they gave the check, nor till October 9, 1900. There is honestly due plaintiffs from defendant $117.25.

Henry Wiesmann, for the appellants.

For the respondent the cause was submitted on the brief of *Cooper, Simmons, Nelson & Walker.*

MARSHALL, J. The foregoing statement indicates that the judgment complained of was obtained through appellants' inadvertence, surprise, or excusable neglect. The only authority for relief therefrom by motion in the action is found in sec. 2832, Stats. 1898, which provides that the court, in its discretion, may grant such relief to a party at any time within one year after notice of the judgment. Notwithstanding respondent's attorneys pursued appellants to enforce the judgment and collected pay from them, they say their action was merely to obtain peace; that they did not know of the judgment till over two years thereafter. Upon that appellants depended to satisfy the court that their motion was seasonably made. The trial court evidently deemed the story too unreasonable for belief, though not met by opposing affidavits. It seems that respondent should have presented some proof on the question, but we are inclined to agree with the court below that appellants' story is not worthy of belief. We must assume that they were men of

mental responsibility, and, as such, ought to have known that the claim upon which they made payment was on a judgment. There was no reasonable ground to believe otherwise. They knew, or ought to have known, of the judgment as early as April, 1898, and waited nearly three years before applying for relief therefrom. There was no course open to the court but to deny the motion.

By the Court.—The order appealed from is affirmed.

PALICA, Respondent, vs. PALICA, Appellant.

April 2—April 22, 1902.

Divorce: Judgment: Alimony and division of estate: Revision.

1. A judgment of divorce from bed and board, divesting each party of all interest in the real estate owned by the other, confirming title in each, giving plaintiff the household furniture, and requiring defendant to pay her a certain sum each month for her support, is *held* not to make a final division of the defendant's estate, but to provide for alimony only, and to be subject to revision under sec. 2369, Stats. 1898. [Whether under sec. 2364 the court may both make a division and grant alimony, not determined.]
2. Where an application for revision of an allowance of alimony presents a *prima facie* case for relief, the court should not act upon affidavits of the parties, but should either summon witnesses and take testimony or direct a reference for that purpose.
3. Payment of alimony as allowed cannot be avoided merely because it is burdensome, but there must be a showing that further payments are not necessary, or of such inability to pay as reasonably to excuse performance.

APPEAL from an order of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Affirmed.*

On July 6, 1899, the plaintiff secured a judgment of divorce from bed and board, forever. The judgment gave

plaintiff the custody of their two minor children, and contained provisions as to alimony and property as follows:

"Third. That each of the parties is hereby divested of all interest in the real estate owned by the other, as described in the findings now on file, and the title of each is hereby confirmed in such real estate as may now be in his or her name. Fourth. And that, as a provision for the plaintiff's support, the defendant shall pay or cause to be paid to the plaintiff the sum of one hundred eighty dollars ($180.00) annually, to be paid in monthly instalments, in advance, of fifteen dollars ($15.00) for each month; the first payment to be made on the 15th day of July, 1899, at the office of Max W. Heck, plaintiff's attorney; the other payments to be made on the 15th day of each month thereafter to the plaintiff personally. That the household furniture, exclusive of the library, is hereby awarded to the plaintiff, and the title thereto is hereby vested in the plaintiff."

In April, 1901, the defendant filed a petition setting out the provisions of the judgment; that his financial condition had changed for the worse since it was rendered; that the plaintiff was in good circumstances and did not need assistance from him,—and claimed that the judgment was void, as to the allowance of alimony, because it decreed both a division of property and allowance for alimony, contrary to the provisions of secs. 2364, 2369, Stats. 1898, and asked to have the judgment revised and the allowance for alimony set aside. The plaintiff filed an affidavit denying the allegations of the petition, and alleging that she had no income except the allowance made for her in the judgment, and that her state of health was such that she was unable to earn her own living.

The court heard the matter upon the files, petition, and affidavit, and denied the motion. The defendant appeals from the order denying his petition.

For the appellant there were briefs by *Bohmrich & Maher,* and oral argument by *Louis Bohmrich.* They contended, *inter alia,* that the judgment, so far as it vests and divests

title to real estate in the wife and in the husband, is final and conclusive and can not be modified by the trial court after the term at which it was rendered. *Webster v. Webster,* 64 Wis. 438; *Campbell v. Campbell,* 37 Wis. 206; *Hopkins v. Hopkins,* 40 Wis. 462; *Bacon v. Bacon,* 43 Wis. 197.

For the respondent there was a brief by *Heck & Krenzke,* and oral argument by *Max W. Heck.*

BARDEEN, J. The defendant's motion to modify the divorce judgment has a twofold aspect: He first attacks the judgment on the ground that the court had no power, under sec. 2364, Stats. 1898, to make a division and distribution of the property of the husband and also grant an allowance of alimony. He also seeks a revision of the allowance for alimony on the ground of a change in his financial condition, rendering it burdensome for him longer to continue payments. In so far as his application is based upon the latter ground, we do not approve of the practice adopted by the trial court. To disturb a solemn judgment so soon after its rendition, upon affidavits taken *ex parte,* would be an extremely hazardous proceeding. Such affidavits may make a *prima facie* showing for relief. The opposing affidavits, as in this case, may deny the grounds alleged. Such affidavits seldom present the true situation of the parties. There may be, and usually are, facts and circumstances important for the court to know that are seldom carried into the papers presented on such hearings. We suggest, for the guidance of trial courts on hearings of this kind, that, where the petition presents a *prima facie* case for relief, the court either direct a reference to take the testimony, or that he summon the witnesses and take such testimony in open court. This will enable the court to get at the true situation of the parties, and to make a more intelligent and just conclusion.

Whether the court has or has not the power, under sec. 2364, to grant alimony, and at the same time make a final

division and distribution of the husband's estate, is a question we need not now decide. We are clearly of opinion that the judgment in this case does not attempt to do both. The findings in the record show that defendant was possessed of certain real estate described, and that the plaintiff owned the homestead of the parties, and a house and lot adjoining; that she also had title to a store building and lot, which the judgment recites she derived from her son "at the instance of defendant." The judgment in question divests each party of all interest in the real estate owned by the other, and confirms the title in each, and gives the plaintiff the household furniture of the parties. In addition, the husband was to pay $180 annually for the support of plaintiff. This case is not unlike *Blake v. Blake,* 68 Wis. 303, 32 N.W. 48, where it was held that every provision made in a judgment of divorce for the support of the wife, unless it is expressly declared to be a division and partition of the estate of the husband, will be construed as alimony, and the court may afterwards, under changed circumstances, modify such judgment as may be just. In that case the wife was given a certain sum of money in full for her claim in any property of which the defendant had been seised during coverture, to be paid upon her executing a good and sufficient release of her claims in his real estate, "and in full of any claim for alimony." This was held not to be a final division of the property, so as to bar the court from changing or modifying the judgment, under sec. 2369. The fact that plaintiff was deprived of her right of dower in her husband's property, and he of the right of curtesy in the real estate she possessed, cannot be construed as a final division of the husband's estate. Nor does the fact that the wife was given the household furniture seem at all conclusive that such was the court's intent. The court's allowance of an annual sum for alimony would seem to be indicative of a contrary intent. The conclusion stated finds support in the following cases in this court: *Campbell v.*

Campbell, 37 Wis. 206; *Hopkins v. Hopkins,* 40 Wis. 462; *Thomas v. Thomas,* 41 Wis. 229. We do not think the judgment was intended as a final division of the estate of the husband, and hence it does not come within the limitations suggested by defendant's counsel as being contained in sec. 2364.

No good reason was shown why the court should modify the judgment because of defendant's changed financial condition. Every allowance of alimony is more or less burdensome to the party who has to pay it. Its payment cannot be avoided merely because it is burdensome. There must be a showing either that further payments are not necessary, or of such an inability to pay as reasonably to excuse performance.

By the Court.—The order is affirmed.

WIESMANN, Appellant, vs. DANIELS, Respondent.

April 3—April 22, 1902.

Estates of decedents: Claims: Services of attorney to administrator: Administration* de bonis non: *Parties.

1. Services of an attorney rendered to an administrator constitute a claim against the latter personally, to be charged against the estate if reasonable and proper upon his accounting; and where the administrator has been discharged without payment for such services the attorney is not a creditor of the estate and cannot apply under secs. 3807, 3808, Stats. 1898, for the appointment of an administrator *de bonis non.*
2. Where an application for the appointment of an administrator *de bonis non* shows that a certain person is in possession, under some claim of right, of land which is sought to be sold to pay debts, such person has such an interest in the matter as entitles him to appear and oppose the application.

APPEAL from an order and a judgment of the circuit court for Kenosha county: FRANK M. FISH, Circuit Judge. *Affirmed.*

On April 10, 1901, *Henry Wiesmann* filed in the county court of Kenosha county, Wisconsin, a verified petition praying for the issuance of letters of administration *de bonis non,* with the will annexed, of the estate of one Cornelius McKune, deceased. The petition alleges, in substance, that said deceased died February 20, 1865, testate, and that his will was thereafter admitted to probate by said county court, and that letters testamentary, with the will annexed, were issued to the widow of said deceased, and that said widow died October 12, 1884, without having fully administered said estate; that letters of administration *de bonis non* were issued October 18, 1890, to one Henry Barns, who acted as such administrator until he filed his account and resigned his trust, October 23, 1897, which resignation was accepted by the judge of said county court; that the petitioner, as the attorney for said Henry Barns as such administrator, rendered professional services to said Barns, and paid out certain moneys in the prosecution of the legal business of said estate, amounting to $600 in all, which sum has never been paid him; that no administrator has been appointed since the resignation of said Barns; and that in order to pay the sum so owing to the petitioner, and to carry out the provisions of the will of the deceased, it is necessary to sell certain real estate owned by the said deceased,—160 acres thereof being now in the possession of *Jacob Daniels,* the respondent, and having been in his possession since November, 1881, without the payment of any rent. The petition prays for the issuance of letters of administration to one Jordan, of the city of Kenosha, and for the ascertainment of the amount due the petitioner, and that the debts and legacies of the estate may be paid out of the rents of said real estate, and that said real estate may be sold, if necessary, to pay said debts, legacies, and the amount due to the petitioner, and that the estate may be fully administered as provided by law.

Upon the filing of this petition in the county court, *Jacob Daniels* filed in said court his objection to the granting of the prayer of the petition, and demurred to said petition on the ground of insufficiency of facts and the want of legal capacity in said petitioner to prosecute the same. Upon the hearing of said petition and objections in the county court, the demurrer was sustained, and the petition dismissed, whereupon the petitioner appealed to the circuit court of Kenosha county, in which court the demurrer of the respondent, *Daniels,* was sustained, and judgment entered dismissing the petition. From the order sustaining such demurrer, and from the judgment of dismissal, the petitioner appeals to this court.

When the case was reached for argument in this court, the respondent appeared by attorney, and suggested to the court the fact that after the rendition of judgment in the court below a judgment had been entered by the county court of Kenosha county, upon application duly made, adjudging that the petitioner was insane; and in support of such suggestion the respondent filed in this court a certified copy of such judgment. Upon consideration of this suggestion, this court, of its own motion, appointed Wallace Ingalls, Esq., of the Racine county bar, guardian *ad litem* of said *Wiesmann,* for the purposes of this action in this court; and, said appointment being accepted, the case was argued by Mr. Ingalls on behalf of the plaintiff, and for the respondent by Mr. Geo. Kroncke.

For the appellant there was a brief by *Henry Wiesmann,* and oral argument by *Wallace Ingalls.*

For the respondent there was a brief by *Peter Fisher,* and oral argument by *George Kroncke.*

WINSLOW, J. There are but two questions in the case: (1) Was the petitioner entitled to apply for the appointment

of an administrator? and (2) Was the demurrant entitled to appear and resist the application?

1. A mere stranger, having no interest in the estate or its administration, cannot move the court for the appointment of an administrator. Stats. 1898, secs. 3807, 3808. This is elementary. The only capacity in which the petitioner claims to be entitled to appear is as a creditor of the estate. His petition, however, does not show him to be a creditor. His claim is for services rendered to Barns as administrator, and, as such, is a claim against Barns personally, to be by him charged against the estate in his hands upon his accounting, if the outlay be proper and reasonable. *McLaughlin v. Winner,* 63 Wis. 120, 23 N. W. 402; *Miller v. Tracy,* 86 Wis. 330, 50 N. W. 886; Schouler, Ex'rs (2d ed.) §§ 256, 544. No exceptional circumstances, such as insolvency of the administrator, are alleged, which have sometimes been held to justify a court in ordering payment out of the estate directly to the claimant.

2. We can entertain no serious doubt that the demurrant was so far an interested party in the proceeding as to entitle him to appear and oppose the application. It appears on the face of the petition that he is in possession of a tract of land under some claim of right, which the petitioner claims should be sold by the proposed administrator as a part of McKune's estate, thus creating a cloud upon the title. The application was, in effect, the first step in a proceeding *in rem;* the *res* being the land occupied and claimed by the demurrant. His interest in such a proceeding is very substantial and direct.

By the Court.—The order and judgment appealed from are both affirmed.

ALLEN, Respondent, vs. CLAUSEN, imp., Appellant.

April 3—April 22, 1902.

Street railways: Unauthorized grant of franchise to individuals: Injunction: Equity.

1. The owner of a lot abutting on a street may enjoin the laying of a street railway track which is about to be laid without authority of law in front of his premises.
2. Although a court of equity will not, at the suit of a private individual, question the regularity of the proceedings by which a municipality has, under duly delegated authority, granted a franchise on behalf of the state, of which the grantee is in *de facto* exercise and enjoyment, yet where a franchise is relied upon to justify otherwise unlawful acts, such a court may investigate and determine whether the grantor of such alleged franchise had power to grant it.
3. Municipal corporations have power only by delegation from the state to grant franchises to use streets for street railway purposes.
4. Sec. 1862, Stats. 1898, authorizes any municipal corporation to grant the use of its streets for street railway purposes to any corporation organized for such purpose, "or to any person who has the right to construct, maintain, and operate street railways." *Held*, that the words quoted refer only to persons who, under prior statutes, have already received franchises for such purpose, and no such franchise can be granted by a city to other individuals.

APPEAL from a judgment of the circuit court for Kenosha county: FRANK M. FISH, Circuit Judge. *Affirmed.*

On July 2, 1900, the common council of the city of Kenosha, over the mayor's veto, passed an ordinance granting to Patrick F. Haynes and *Gustav L. Clausen,* residents and citizens of Chicago, Illinois, their associates, personal representatives, and assigns, the right to construct and operate a passenger street railway over certain specified streets in the city of Kenosha, including South street, opposite the plaintiff's premises; also providing that said grantees should have the right to extend and operate such street railway in and

along any other street or streets in the city of Kenosha when the written consent of the owners of the land representing more than one half of the frontage of each street should be obtained. As a condition it was provided that "at the time of the acceptance of this ordinance, and as a condition precedent to obtaining any rights or privileges thereunder, [the grantees should] file with the city clerk . . . a bond, to be approved by the mayor, . . . in the penal sum of fifty thousand dollars, executed as surety by some reputable and satisfactory surety or guaranty company," with specified conditions, among others, that they should pave certain streets and construct a bridge. It also required them to hold the city harmless from all damages, judgments, etc., resulting from the granting of the privileges, and to file a further bond in the sum of $10,000, with "surety to be approved by the mayor, conditioned upon the faithful performance and observance by said company of all the conditions and provisions of this ordinance." It also required a deposit of $5,000 in money, and the repayment to certain property owners of the cost, already paid by them, for certain paving; and by the last section it was provided that the ordinance should take effect from and after its acceptance in writing, provided that such acceptance should be filed with the city clerk within thirty days after its passage.

The acceptance, together with bonds in attempted compliance, were filed on the 30th day of July; but the $50,000 bond was signed by one individual as surety, and not by any surety or guaranty company, and there was no evidence at the time the case was tried, in October, that the same had been approved by the mayor. The plaintiff, who was the owner of a tract of land having a frontage of about 280 feet on South street and a frontage on two other streets, commenced this action on the 26th day of July, the summons and complaint being served on the defendant *Clausen,* the other defendants not being found. An order to show cause for a

temporary injunction was also served, and heard on July 31st, but was never decided, and did not contain any intermediate restraining order.

The complaint alleged purpose and threat by the defendants to build a street railway at the places permitted by the ordinance, and alleged irreparable damage to the plaintiff's premises occupied by her as a residence and ornamented by shade trees, which would be injured or destroyed by the construction and operation of the road. It prayed injunction against their acceptance of the ordinance or entering upon the construction of any railway thereunder, and from operating any railway along any of the streets mentioned in the ordinance and particularly along the streets bounding plaintiff's premises; also that the ordinance be decreed to be invalid and of no effect; and for general relief. The defendants claimed that their ordinance was a valid franchise, conceded that they intended to build on South street, but not upon the other streets bounding plaintiff's premises, and denied injury to the plaintiff's premises.

The court, upon trial, filed findings substantially in accordance with the allegations of the complaint, but also found that the ordinance as originally submitted by the defendants was published in the official paper for two weeks before it was acted upon, but that no written application for said franchise or for any franchise was filed by the defendants or either of them with the city clerk of said city, except said draft of ordinance, and that the $50,000 bond had never been approved by the mayor. As conclusions of law, the court decided that that part of the ordinance purporting to give the right to construct a railway generally upon streets other than those specified is void; that the construction and operation opposite plaintiff's premises would constitute a continuing trespass, unless authorized by valid grant from the common council of the city of Kenosha; that by failure to file an approved bond prior to August 1, 1900, as required

by section 10 of the ordinance, the grantees failed to acquire or retain any right to the use of said street. Thereupon judgment was entered expressly adjudging that portion of the ordinance attempting to grant general privileges on unspecified streets to be void, and perpetually enjoining and restraining the defendant *Clausen,* his agents, attorneys, servants, employees, and those claiming under or through him, from entering upon South street where the same abuts upon the premises of the plaintiff, and from laying any rails thereon, or constructing or operating any railway thereon, or erecting or maintaining any trolley poles or wires thereon.

That judgment was entered January 9, 1901. On March 12th of the same year and at the same term defendants moved for a new trial on the judge's minutes, and on the ground of newly discovered evidence, to the effect that the mayor had been absent from the city at the time of the trial, having in his possession the $50,000 bond filed by them; that he had treated the same as approved and satisfactory, but on December 6, 1900, had notified defendants of his desire for a bond signed by a surety company, which was thereupon delivered to him, and he, on January 4, 1901, had returned the former bond, accompanied by a letter stating that he had approved the new bond, and with reference to the earlier one said: "This latter bond I have held as approved and satisfactory pending the delivery to me of the guaranty company bond." This motion was denied by order dated May 15, 1901. Thereafter, on May 18, 1901, and after the expiration of the term at which the judgment had been rendered, the defendants made a further motion based upon the facts above stated with reference to the giving and approval of the new bond, praying that the judgment be annulled, modified, or vacated, and the restraining order thereunder and thereby granted vacated or modified, by reason of facts occurring subsequent thereto, or, if that relief should be denied, that the defendants should be permitted to file a bill

of review. That motion was also denied by order filed July 15, 1901.

The defendant *Clausen* appeals from the whole of the judgment and from both of said orders.

For the appellant there was a brief by *Gerald R. McDowell,* and oral argument by *Mr. McDowell* and *Mr. Wallace Ingalls.*

For the respondent there was a brief by *John C. Slater,* attorney, and *Charles Quarles,* of counsel, and oral argument by *Geo. Lines.*

DODGE, J. The principal relief granted respondent in the judgment before us is injunction to prevent a strictly private injury to her separate property, which the trial court has, upon sufficient evidence, found will be caused by defendant's threatened entry upon the portion thereof included within South street and construction of street railway thereon. That injury is not one common to others or to the public. It consists, not in incumbering South street as a public way, nor obstructing general travel thereon, nor in the entry upon lands of others from which they might suffer similar injuries, but in direct entry upon plaintiff's own premises, injuring her in the enjoyment thereof; such injury being irreparable and not remediable by action at law. That plaintiff must submit to such injury without remedy or compensation, when the acts are done within the street by authority of law, is sustained by a line of decisions from *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, to *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851. But, as is also said in the last-cited case (107 Wis. 510, 83 N. W. 856), "that an abutting lotowner may enjoin the laying of a railway track which is about to be laid without authority of law on the street in front of his premises cannot be doubted for a moment."

In approaching the question whether the defendant's

threatened acts are "by authority of law," we are confronted by an objection urged by appellant to the effect that, since he claims to act under a franchise from the state, a court of equity cannot inquire as to the validity of that franchise at the suit of a private individual; citing *Ashland St. R. Co. v. Ashland,* 78 Wis. 271, 47 N. W. 619; *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496, 66 N. W. 512; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 69 N. W. 791; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 39, 69 N. W. 794; *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57; *Linden L. Co. v. Milwaukee E. R. & L. Co., supra.* These cases have established the law in Wisconsin that the vacating of a franchise granted by the state can be accomplished only by proceeding in the nature of *quo warranto* in the name of the state, and that it is not within the province of a court of equity, at the suit of a private plaintiff, to question the regularity of the proceedings by which a municipality has, under duly delegated authority, granted a franchise on behalf of the state, of which the grantee is in *de facto* exercise and enjoyment. It has, however, never been held that, where one attempts to justify acts by a pretended license or franchise which the grantor had no power whatever to confer, a court, whether of law or equity, cannot discover that fact and deny the claim of justification. It matters not whether such defect of power rests upon the state itself or upon any of its subordinate agencies attempting its exercise. The readiness of courts so to do has been evinced in many cases in this state and elsewhere. *Sellers v. Union L. Co.* 39 Wis. 525; *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561, 70 N. W. 678; *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, 74 N. W. 538; *Pittsburg, C. & St. L. R. Co. v. Hood,* 94 Fed. 618; *General Electric R. Co. v. C., I. & L. R. Co.* 98 Fed. 907, 911; *New Orleans G. L. Co. v. Louisiana L. & H. P. & M. Co.* 115 U. S. 650, 6 Sup. Ct. 252; *Louis-*

ville & N. R. Co. v. M., J. & K. C. R. Co. 124 Ala. 162, 26 So. 895; *Zanesville v. Gas Light Co.* 47 Ohio St. 1, 23 N. E. 55. Among the reasons urged against the validity and existence of the ostensible franchise to defendant on which he relies as authority of law for his threatened acts, one is absolute want of power in the city of Kenosha to grant it. That we will consider first.

That the highways of the state are under the control of the general state government, and that the right to use the same for telegraphs, telephones, water pipes, or street railways is by franchise emanating from the state, is declared in many of the foregoing decisions; also in *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 620, 46 N. W. 487; *Marshfield v. Wis. Tel. Co.* 102 Wis. 604, 609, 78 N. W. 735; *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697; *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657; 3 Cook, Corp. § 913. As a corollary, it results that the municipal corporations have power to make such grants only by delegation from the state. For the subject in hand the only delegation which has been made is contained in sec. 1862, Stats. 1898, as follows:

"Corporations for constructing, maintaining and operating street railways may be formed under chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways, the use . . . of any streets or bridges within its limits for the purpose of laying single or double tracks and running cars thereon."

It is a general proposition that a municipal corporation possesses and can exercise only powers granted by express words, or those necessarily implied therein or incident thereto, or those essential to the declared purposes,—not merely convenient, but indispensable. Any ambiguity or doubt as to existence of a power is to be resolved against the corporation,

and the power denied. Dillon, Mun. Corp. § 89 *et seq.* Another cardinal rule of construction is that the grant of a power under specified circumstances, or accompanied by defined conditions or limitations, excludes that power otherwise. The maxim, *expressio unius, exclusio alterius,* is especially controlling upon such legislation. The application of such rules of construction to sec. 1862, Stats. 1898, must, of course, result in denial of power in any city to grant franchise to use streets for a street railway, except to a corporation organized for the purpose of operating such establishment under our statutes, or to persons "who have a right to construct, maintain, and operate a street railway." The last class obviously does not contemplate persons who have merely the common right to do business, for to that end the quoted words would be meaningless. The legislature must have intended to limit such franchises to persons distinguished from the great mass of mankind by the qualifying description. A glance at the history of this legislation discloses the probable existence of a class of persons so distinguished, as also a strong probability of a legislative purpose to recognize that class.

The first delegation of any such power to municipal corporations occurs in ch. 313, Laws of 1860, which authorized the granting of use of streets for street railways "to any street railway company, organized under any general or special act of the legislature of this state, or to any individual, or association of individuals." In the revision of 1878 this act was incorporated as sec. 1862, but changed so as to confine the grant to corporations. About two years after those revised statutes took effect sec. 1862 was amended by ch. 219, Laws of 1881, by inserting, as permissible grantees, "or to any person who has the right to construct, maintain, and operate street railways." The legislative policy evinced by these acts seems obvious: first, in 1878, to confine grants to corporations; secondly, in 1881, to recognize the existence

of individuals who, under authority of the law prior to 1878, were already in possession of rights to operate street railways, and who, therefore, ought to be permitted to receive further grants to enable the development and extension of their railways to meet the public needs and convenience. The descriptive words used with reference to the permitted individual grantees are well adapted to segregate those who already had franchises from the rest of mankind. Those who have not received such franchise cannot, in any fair sense, be said to have the "right to *construct, maintain and operate* a *street* railway." Men generally may, as counsel urge, have the natural right to build and use a railway on their own land or on that of others by their license; but a street railway, as mentioned in the statutes, means one laid in a street, and no man has a right to either construct or operate a railway there without permission so to do from the state.

Appellant's counsel needlessly argue at length for the natural right of individuals to receive such a franchise. That is not questioned, but only whether the legislature has empowered a municipality to grant it to them. As there is no pretense that defendants or any of them are within such class of individuals to whom franchise is so authorized to be granted, we may, for the purposes of this case, consider the statute as if it in terms only authorized grants to street railway corporations, except, indeed, as the express mention of certain individuals the more clearly negatives grant to any others. That an authorization to grant such franchises only to corporations excludes any power to confer one on individuals, and renders void any attempt so to do, has been often decided by other courts. *Detroit C. St. R. Co. v. Detroit,* 12 C. C. A. 365, 64 Fed. 628, 641; *Knoxville v. Africa,* 23 C. C. A. 252, 77 Fed. 501, 507; *Fanning v. Osborne,* 102 N. Y. 441, 447, 7 N. E. 307; *Case v. Cayuga Co.* 88 Hun, 59, 34 N. Y. Supp. 595; *Geneva & W. R. Co. v. N. Y. C. & H. R. R. Co.* 24 App. Div. 335, 340, 48 N. Y. Supp. 842;

Homestead St. Ry. v. P. & H. E. St. Ry. 166 Pa. St. 162, 172, 30 Atl. 950.

The reasons for such holdings are obvious. The legislature having created corporations for the public purpose of operating street railways, having hedged them about with a code of statutory regulations for the safety and convenience of the public, and having the reserved right to change and control them, even to destroy them, may well adopt a policy of conferring extraordinary rights in its highways only upon the corporate bodies so within its control. We cannot doubt that such legislative policy and purpose is apparent in our statutes, and that from the municipal corporations has been withheld any power to grant to individuals, except of the specified class, franchises to construct or operate street railways in or over the public streets. In this view, and under the authorities above cited, the attempt by the city of Kenosha to confer such privilege upon these defendants was utterly futile, and does not constitute authority of law to protect them when disturbing plaintiff's private rights.

This conclusion, of course, renders unnecessary consideration of the details of the ordinance, or of the proceedings in enacting or accepting the same, as well as any decision upon the extent to which a court of equity can properly go in such consideration. Our decision rests upon entire absence of power, and not upon the manner of executing a power if any existed. Neither does there remain any necessity to discuss the propriety of the orders appealed from, denying motions for a new trial and for vacation of the judgment, or, in alternative, leave to present a bill of review. No grounds are suggested as the bases of either motion which can avert the result of the conclusion reached on the merits. As to the last motion, we might call attention to *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433.

By the Court.—Judgment affirmed.

THE STATE EX REL. KALTENBACH, Appellant, vs. SHIEL, Respondent.

April 3—April 22, 1902.

Justices' courts: Jurisdiction: Replevin: "Filing" of affidavit.

An affidavit for a warrant of replevin was sworn to before a justice and was present when he issued the warrant, but was taken away by the officer serving the warrant, and returned with the warrant two or three days later, and was then indorsed by the justice as having been filed on the day it was made. The docket entries of the justice referred to the affidavit as a pleading so filed pursuant to statute. *Held*, that the affidavit was filed with the justice when it was first made, and he did not lose jurisdiction by his failure to retain it in his office and to indorse it at that time.

APPEAL from a judgment of the municipal court of Racine county: D. H. FLETT, Judge. *Affirmed.*

For the appellant there was a brief by *Heck & Krenzke,* and oral argument by *Charles Krenzke.*

For the respondent the cause was submitted on the brief of *Cooper, Simmons, Nelson & Walker.*

CASSODAY, C. J. Upon the verified petition of the relator, an alternative writ of *mandamus* was issued by the trial court, requiring the defendant, as justice of the peace, to amend the record of his court in an action of replevin wherein Mrs. John Kaltenbach was plaintiff, and the petitioner, *Peter Kaltenbach,* was defendant, by stating the time of filing the affidavit and the return and the filing of the warrant according to the facts stated in the petition, or show cause to the contrary on a day named. The defendant made return to the alternative writ, to the effect that at the time of issuing the writ of replevin by him, March 7, 1901, there was on file in his office the necessary and proper affidavit, properly executed and sworn to, and filed in his office as required by law,

authorizing and empowering him to issue the writ, before he issued the same; that such writ of replevin was issued in due course thereafter, and delivered to the proper officer to serve the same, and who returned the same to the defendant, as such justice, March 9, 1901, and which writ was on that day indorsed "Filed" as of March 7, 1901,—but specifically denies all the statements contained in such alternative writ, except as therein admitted.

No question is made but that the affidavit for the writ of replevin was substantially in the form required by the statute. Sec. 3733, Stats. 1898. It purports to have been subscribed and sworn to before the defendant, as justice, March 7, 1901. The record of the defendant shows the same thing. The warrant purports to have been issued by the defendant as justice of the peace on the same day, and made returnable March 11, 1901, at 9 o'clock a. m. It is undisputed, upon the evidence given upon the trial, however, that, while the affidavit for the writ of replevin was sworn to before the defendant, and was present when he issued the warrant, yet that it was taken away by the officer who served the warrant, and was absent from the defendant's office until the warrant was returned, on the 9th or 10th of March, 1901, and was then, with the warrant, indorsed as having been filed March 7, 1901. Did the defendant, as justice of the peace, lose jurisdiction by such failure to retain the affidavit in his office and indorse it as filed when he first received it? We think not. The affidavit must be regarded as having been filed with the defendant when it was first made and the warrant issued thereon, as mentioned. This has repeatedly been held as to the filing of chattel mortgages and claims for liens in the office of the clerk. *Smith v. Waggoner,* 50 Wis. 155, 6 N. W. 568; *Marlet v. Hinman,* 77 Wis. 140, 45 N. W. 953; *Goodman v. Baerlocher,* 88 Wis. 287, 60 N. W. 415; *Bailey v. Costello,* 94 Wis. 91, 68 N. W. 663. The same is true in regard to notice of appeal to this court, served upon or deliv-

ered to the clerk of the trial court for the purpose of complying with the statute. *In re Madden's Will,* 104 Wis. 63, 80 N. W. 100; *Willey v. Clark,* 105 Wis. 22, 80 N. W. 102; *Flanders v. Keefe,* 108 Wis. 448, 84 N. W. 878. See *Koch v. Hustis,* 110 Wis. 62, 85 N. W. 643. The petition shows that the officer serving the warrant took possession of the goods described therein, as directed in the warrant, March 7, 1901. The statute made the affidavit for the writ of replevin the complaint in the action. Sec. 3739, Stats. 1898. The docket entries of the defendant as justice show a brief statement of the nature of and reference to the affidavit as a pleading so filed, as required by the statute. Subd. 4, sec. 3574, Stats. 1898. The record of the defendant as justice of the peace substantially complies with the statutes, as shown by the undisputed evidence as well as the return to the alternative writ and the findings of the court.

By the Court.—The judgment of the municipal court of Racine county, dismissing the alternative writ of *mandamus,* with costs against the petitioner, is affirmed.

BARRY, Respondent, vs. NIESSEN, Appellant.

April 3—April 22, 1902.

Judgment: Lien: Docketing: Bastardy.

1. A judgment in bastardy proceedings which does not adjudge the present payment of any sum to the mother of the child cannot be docketed so as to become a lien in her favor upon land of the defendant.
2. Where the judgment in bastardy proceedings directs that defendant pay to the mother a certain sum per year for the support of the child, but does not direct payment in advance, such sum becomes due only at the end of each year's support.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Affirmed.*

This was an action for the partition of certain real estate in the city of Racine. The plaintiff's rights to an undivided one-quarter of the premises in question were undisputed, except by the appellant, *Gertrude Niessen*. The material facts in the case were undisputed, and were as follows:

One Virginia Lugg was the owner of the real estate in question, and died at Racine, Wisconsin, intestate, February 13, 1899, leaving as her heirs at law four children, viz., Lydia C. Thompson, Alexia V. Ritz, Martha Lugg, and Herbert J. Barry, each of whom became the owner of an undivided one-fourth interest in the property. The said Barry prior to August, 1899, had married the plaintiff, *Ella Barry*, and said *Ella Barry* in August, 1899, commenced a divorce action against said Herbert Barry; and during the pendency of said action the said Herbert deeded to the said *Ella*, in lieu of alimony, his interest in the said real estate, and by the final judgment in said divorce action, in September, 1899, the said transfer of said real estate in lieu of alimony was ratified and confirmed. Some years prior to the marriage of said Herbert Barry and the plaintiff, and in November, 1891, the appellant, *Gertrude Niessen*, had commenced a bastardy proceeding against the said Herbert Barry in the circuit court of Racine county; and on April 13, 1892, after trial and a verdict of guilty, the said Herbert Barry was adjudged to be the father of the child of the said *Gertrude Niessen*, and it was further adjudged that he pay the sum of $11.25 costs, and that he pay to the said *Gertrude Niessen* the sum of $100 per year from the date of said judgment until said child should become thirteen years of age, and that he furnish a bond in the sum of $500 for the compliance on his part with the said judgment. No bond was furnished, and the said Herbert Barry was confined in the county jail for ninety days, at the expiration of which time he was released. No part of the judgment has ever been paid. At the time of the

rendition of the judgment, the clerk of the circuit court made the following entry upon the judgment docket:

"State of Wisconsin, E. O. Hand,
Plff. Dist. Atty.
vs.
"Herbert J. Barry,
Def. April 13, 1892,
Amount —
Costs — $111.25. At 3 o'clock p. m.
Amount to become due."

No attempt was made by *Gertrude Niessen* to collect the judgment by the issuance of execution.

On September 26, 1899, the plaintiff commenced this action of partition in the circuit court of Racine county, making the other heirs of Virginia Lugg defendants. On January 3, 1900, *Gertrude Niessen* appeared and intervened in the action, and claimed that she had a lien against that portion of said real estate owned by *Ella Barry,* because of the bastardy judgment aforesaid, and prayed that her lien be enforced by the court. A stipulation was entered into by the parties May 3, 1900, by which the partition suit was dismissed as against all the parties excepting *Gertrude Niessen,* the defendants paying into court $825, which was agreed to be the full share of *Ella Barry* in the real estate in question, and which sum was to be held in court subject to the determination of the contest between *Ella Barry* and *Gertrude Niessen.* It was admitted that the child of *Gertrude Niessen* had been supported by her since the date of the bastardy judgment, April 13, 1892, and it was found that there was due upon the judgment the sum of $1,016. Upon these facts the circuit court held that the bastardy judgment did not become a lien upon the real estate of Herbert Barry, and that the plaintiff, *Ella Barry,* was entitled to the sum of $825 so paid into court. From a judgment in accordance with this finding, *Gertrude Niessen* appeals.

For the appellant there was a brief by *John W. Owen* and *Hand & Hand,* and oral argument by *E. B. Hand.*

Martin J. Gillen, for the respondent.

WINSLOW, J. The sole question in this case is whether the bastardy judgment became a lien upon the real estate of Herbert J. Barry, in favor of the mother of the child. No judgment becomes a lien upon real estate unless it be duly docketed (Stats. 1898, sec. 2902), and it cannot be docketed unless it be a judgment directing the present payment of money (Id. sec. 2899). The docketing must be done at the time of filing the judgment roll, and there are no provisions for docketing of instalments which grow due in the future and depend upon contingencies (Id. sec. 2899; *Staples v. Staples,* 87 Wis. 592, 58 N. W. 1036). So far, then, as the judgment provided for the payment of the sum of $100 per year for the support of the child in the future, it was incapable of docketing, and hence the fact that there was an entry on the docket purporting to docket a judgment for "amount to become due" could have no legal effect. Execution might issue upon motion when an instalment became due and remained unpaid, and property could be levied upon thereunder (Stats. 1898, sec. 1538); but no execution was ever in fact issued, so no lien was acquired in this way.

Had the judgment ordered the present payment of any specified sums of money to the appellant for lying-in expenses, or the previous care and support of the child (Stats. 1898, sec. 1535), a different question would be presented. No reason is perceived why, as to such sums, the judgment might not be properly docketed, and become to that extent a lien upon property. It is true that a bastardy proceeding is said to be *quasi* criminal in its character, so far as the practice is concerned. *State v. Mushied,* 12 Wis. 561. Nevertheless it has often been held that it is not in fact a criminal prosecution, but (when instituted by the mother) is a proceeding

to enforce the father's natural obligation to support his child, and brought for the benefit and protection of the mother. *Baker v. State,* 65 Wis. 50, 26 N. W. 167. It was manifestly under this view of the real nature of the action that it was held by this court that the mother might maintain a creditor's action to enforce a bastardy judgment in her favor. *Pierstoff v. Jorges,* 86 Wis. 128, 56 N. W. 735.

The insurmountable difficulty in the present case is that the bastardy judgment in question here did not adjudge the present payment of any sum of money to the mother. It adjudged generally that the father pay $11.25 costs of the action, but it does not appear, either by the judgment, or by any evidence in the case, that the mother of the child was entitled to recover these costs. Further, it is adjudged that he pay to the mother $100 per year from the date of the judgment until the child should become thirteen years of age, manifestly for the support of the child. There is no direction that such sums for support shall be paid in advance, and hence they cannot be held to become due until they have been earned, namely, at the end of each year's support. So the only sum adjudged to be presently paid by the judgment, for which it could be legally docketed, is the sum of $11.25 costs; and it does not appear that this sum was payable to the intervener.

The necessary conclusion is that the judgment below is right.

By the Court.—Judgment affirmed.

POLACHECK and another, Appellants, vs. MOORE, imp., Respondent.

April 3—April 22, 1902.

Bond: Execution by surety: Irregularities in form: Misplaced signatures: Intention to execute: Notice to obligees.

A bond was drafted in form for two sureties, but the name of one only was inserted. It was signed by the principal in the proper place and also at the foot of an imperfect affidavit of justification, which was originally drafted for two sureties but afterwards changed for one. The surety signed only at the foot of said affidavit, and the seals were also there. The surety testified that he had refused to sign as surety, but had agreed to do so if another satisfactory surety were found; that he signed the affidavit merely to indicate his willingness to become a surety, and delivered the paper to the principal with the understanding that when the other surety should be procured the two sureties and the principal would go before an officer and perfect the instrument. The principal thereafter procured a notary to sign the affidavit, and delivered the bond in the form above indicated to the obligees. *Held*, that the condition of the instrument was such as to put the obligees upon inquiry as to whether the surety signed the affidavit with the intention of executing the bond; and that the evidence sustains a finding that he did not execute the bond and that he was not guilty of negligence which reasonably misled the obligees.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action to recover on a bond alleged to have been given to plaintiffs by defendant Lucas as principal, with defendant *William Moore* as sole surety, to secure the faithful performance by Lucas of an agency contract. The following is a copy of the instrument in the condition it was in at the time of the delivery to plaintiffs:

KNOW ALL MEN BY THESE PRESENTS: That we, J. W. Lucas, as principal, and Wm Moore and ..... as sureties, all of Menominee, Michigan, are held and firmly bound unto J. & S. Polacheck, of Milwaukee, Wisconsin, in the sum of three hundred ($300.00) dollars, to be paid to the said J. & S. Polacheck, or their certain attorney, executors, administrators or assigns. And said J. W. Lucas does hereby agree that on the first day of each month to mail to J. & S. Polacheck a true statement of all goods sold and delivered, and also remit in full for the same, for which payment well and truly to be made, we bind ourselves, our heirs, and executors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION is such that if the above bounden J. W. Lucas, his heirs, executors and administrators shall and do well and truly pay or cause to be paid to the above named J. & S. Polacheck for all clothes, or money for the same, that he shall receive for the same, as their agent, without fraud or delay, then this obligation to be void; otherwise to remain in full force and virtue.

State of Michigan : ss
Menominee county :

J. W. Lucas
Wm Moore ..... ~~and~~
....., being ~~each for himself~~
duly sworn deposes and says that he is worth over and above his debts and liabilities

.....

Sealed this 26 day of ~~January,~~ February 1898.

State of ~~Michigan~~ Wisconsin : J. W. Lucas ..... (Seal)
City of ~~Menominee~~ Marinette : Wm Moore ..... (Seal)
County of ~~Menominee~~ Marinette : ..... (Seal)

BERNARD H. ANDERLY,
Notary Public.

The paper was signed by the principal in the proper place, but not by the surety. The latter testified, under objection, that he refused to sign as surety; that he consented to do so upon another satisfactory surety being produced; that he signed the affidavit merely to indicate willingness to become a surety, and delivered the paper to Lucas with the understanding that another satisfactory surety should be produced and that both sureties and Lucas should then go before an officer and perfect the instrument. The evidence showed that Lucas, without knowledge or consent of *Moore,* procured a notary to sign the affidavit and perfect the paper in the form above indicated; and that he delivered the same to plaintiffs in that condition; that plaintiffs had no notice of the circumstances stated, but relied on the paper as having been duly executed by defendants; that Lucas made default in the conditions thereof, as stated in the complaint.

The referee to whom the cause was referred to hear, try and determine, decided accordingly, and that *Moore* had ample opportunity to inform plaintiffs of the condition under which he signed the paper before they dealt with Lucas on the faith thereof; that Lucas made default to the amount of $388.63, no part of which has been paid; that compliance by *Moore* with the conditions of the bond was demanded by plaintiffs before they commenced this action, and that, by reason of the facts, *Moore* became liable to them for the full penal sum of $300.

The court, on motion, modified the findings of the referee by adding the following: *Moore,* in signing the blank affidavit at the foot of the bond, did not intend to execute the paper as surety. The bond was so defective when delivered to plaintiffs that, as men of reasonable prudence, they should have investigated the cause thereof, and that such investigation would have made known to them the facts in regard to *Moore's* connection with the paper. Plaintiffs are entitled to judgment against Lucas for the amount of his indebtedness,

$388.63. *Moore* is entitled to judgment dismissing the complaint as to him with costs. Judgment was rendered accordingly.

Max W. Nohl, for the appellants.

For the respondent there was a brief by *Eastman & Martineau,* and oral argument by *Pierre Martineau.*

MARSHALL, J. A considerable portion of the brief of counsel for appellants is taken up with the proposition that if a person signs a bond as surety, with a verbal condition that it shall not be binding till another person signs as surety, or with some other verbal condition, and leaves the instrument, subject thereto, with the principal, thereby clothing him with apparent authority to complete the paper and deliver it, or putting him in such a position that he can readily do so without the obligee knowing the facts, and he makes delivery of the paper without complying with the condition, and the obligee, without notice of the breach of authority or such reasonable means of knowledge thereof as would put an ordinarily prudent person upon inquiry as to the facts, in good faith relies upon the instrument, the conditional signer is estopped from denying that he is liable as indicated upon the face of the instrument. It is claimed that such proposition is in harmony with *Belden v. Hurlbut,* 94 Wis. 562, 69 N. W. 357; *New Home S. M. Co. v. Simon,* 104 Wis. 120, 80 N. W. 71; and *Rehbein v. Rahr,* 109 Wis. 136, 143, 85 N. W. 315. We are unable to see how that has anything to do with this case if, as found by the referee and the court, *Moore* did not execute the bond, conditionally or otherwise, or do anything liable to mislead a person of ordinary prudence into believing that he did. Therefore, we omit to pass upon it, without intending to cast any doubt upon anything said in either of the cited cases.

By proper exceptions and assignments of error appellants' counsel challenge the decision of the court above referred to.

If the purpose of *Moore's* signing the paper is open to investigation, there can be no reasonable controversy but that the conclusion complained of is right. The proper place for the signatures of the principal and surety to a bond is at the foot thereof. True, that is also the place for the seals, and in this case they were at the ends of the lines drawn to indicate the proper places for signatures to the justification. That indicates that they were misplaced. Without discussing all the peculiar features of the instrument, it is considered that the court was amply justified in holding that they were such as to put a reasonably prudent person upon inquiry as to whether respondent's signature was affixed to the paper with the intention of executing it. The name "*Wm. Moore*" at the foot of the informal affidavit of justification, conceded to be in respondent's handwriting, is plainly not in the same handwriting as the same name at the proper place in the body of the affidavit. It is not so located that it can reasonably be considered a signature to the bond. It follows the venue of the affidavit and is clearly a part thereof. The principal signed the bond in the proper place. True, he also signed the affidavit, but that does not militate against the fact that he recognized that the proper place to sign for the purpose of executing the bond was at the foot thereof. The affidavit was drafted to be signed by two sureties, and was afterwards changed. The indications are that the same pen and hand that made such change wrote the name "*Wm. Moore*" at the commencement of the affidavit. There are several other features about the instrument that are peculiar. Those to which reference has been particularly made are ample to arouse in the mind of any man of common sense and prudence at least a reasonable doubt as to the purpose of *Moore's* signing as he did. The court rightly modified the decision of the referee as indicated.

Appellants' counsel contends that it is not essential to the validity of a bond that the signatures of the parties thereto

should be in their proper places. That is true, but the conclusion drawn by the referee therefrom on the evidence does not follow. If the signature of a surety to a bond is so placed as to fairly raise a question as to whether it was affixed with intent to execute the instrument, that question must be solved as one of fact upon evidence. It by no means follows as a matter of law, because it is not necessary in order to hold a surety on a bond that his signature be in its proper place, that he is bound by a misplaced signature. The rule is stated in De Col. Guar. & Prin. & Sur. (3d ed.) 190, thus: "Where the party to be charged has not signed the instrument in the usual place, the question is always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." The case cited by counsel, and many others, are to the same effect. *Richardson v. Boynton,* 12 Allen, 138; *Garvin v. Dean,* 115 Mass. 577; *Fournier v. Cyr,* 64 Me. 32.

Having reached the conclusion that the condition of the instrument sued on, when it came to the hands of appellants, was such as to put them on inquiry as to whether respondent signed the affidavit with the intention of executing the bond, and that the resulting question was one of fact to be decided upon the evidence, there is little more that need be said. The question was found by the referee in favor of respondent. The finding was confirmed by the court. All of the direct evidence supports the finding. No circumstance disclosed by the evidence is inconsistent therewith. In other words, all the evidence produced on the subject supports respondent's contention that he never executed the bond, conditionally or otherwise; and the decision of the court, that he was not guilty of negligence which reasonably misled appellants, is warranted by the evidence. It follows that the instrument sued on was never a binding obligation upon respondent *Moore,* either because of his having signed it or been guilty

of such acts as to wrongfully mislead the appellants and be thereby chargeable by estoppel. If appellants were misled into accepting the defective paper as a valid bond, as claimed, their loss is chargeable to their own imprudence, and not to any wrongful conduct on the part of *Moore*.

By the Court.—The judgment is affirmed.

LEEDOM and others, Appellants, vs. MAYER, Respondent.

April 3—April 22, 1902.

Sales: Rescission: Fraudulent intent: Evidence.

In the absence of clear proof of known insolvency or of false representations made to induce a sale of goods, evidence of an intent to defraud creditors, formed some months after the sale, is not sufficient to justify an inference of a predetermined intent not to pay for the goods, such as would give the vendor the right to rescind the sale.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

The plaintiffs are manufacturers of carpets and rugs at Bristol, Pennsylvania. Some time prior to the month of December, 1898, their traveling salesman took an order from defendant for goods to be delivered at future dates on a credit of four months, the bills to bear an advance dating of April 1, 1899. The first invoice of goods was shipped December 7, 1898, and others followed from time to time until April, 1899. On April 1, 1899, defendant gave plaintiffs his note for $2,069.97, due in four months. On July 31, 1899, plaintiffs returned said note to defendant, and demanded a return of the goods, which was refused. Plaintiffs then commenced this action, alleging such sale, the delivery of the goods, the taking and return of the note, the demand for a

return of the goods and refusal, and also that said goods were purchased by defendant with the intention of not paying for the same, and that he was insolvent at the time, and that plaintiffs had no knowledge of such insolvency.

The defendant admitted the purchase and the giving of the note, and denied the other allegations of the complaint. He also set up an adjudication of bankruptcy in the United States court as of August 19, 1899. Considerable testimony was offered as to the manner defendant conducted his business after such sale, tending to show an intent to defraud creditors. It was also shown that he made statements to the Dun and Bradstreet Commercial Agencies, based on his books of 1898, which showed that he had merchandise, accounts, cash, real estate, and personal assets amounting to about $60,000, and owed the bank and upon real-estate mortgages $19,000. In these statements he omitted to include about $14,000, which he claimed he owed his wife, his brother, and other relatives, so that, according to this statement, his net worth should have been about $27,000, instead of $41,000.

After hearing the testimony, the court directed a verdict for defendant. Plaintiffs appeal from the judgment entered in favor of defendant.

For the appellants there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

For the respondent there was a brief by *John A. F. Groth,* attorney, and *Austin, Fehr & Gehrz,* of counsel, and oral argument by *W. H. Austin.*

BARDEEN, J. The only question involved on this appeal is whether there was sufficient evidence to carry the case to the jury. The issue presented by the pleadings was whether the defendant purchased the goods in question with the preconceived intention of not paying for them. The plaintiffs alleged that defendant was insolvent at the time he gave the

order for the goods. This allegation was not proven. On the contrary, we think it is fairly shown that his assets then exceeded his liabilities, including the debts he admitted to be owing to his relatives. But if it be admitted that he was insolvent, that fact alone would not warrant a rescission of the sale. *David Adler & Sons C. Co. v. Thorp,* 102 Wis. 70, 78 N. W. 184; *Nichols v. Pinner,* 18 N. Y. 295; *Consolidated M. Co. v. Fogo,* 104 Wis. 92, 80 N. W. 103; *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599. If he was insolvent, knowing himself to be such, and he purchased the goods without disclosing the fact, with the preconceived purpose of not paying for them, the purchase was fraudulent, and the vendor may rescind the sale. *Lee v. Simmons,* 65 Wis. 526, 27 N. W. 174; *Skinner v. Michigan Hoop Co.* 119 Mich. 467, 78 N. W. 547; *Burrill v. Stevens,* 73 Me. 395. But such sale is not rendered fraudulent by a subsequently conceived intent on the part of the buyer not to pay for them. *Skinner v. Michigan Hoop Co., supra; Burrill v. Stevens, supra; Starr v. Stevenson,* 91 Iowa, 684, 60 N. W. 217. The intent which renders the sale fraudulent is a positive and predetermined intention, entertained and acted upon at the time of going through the forms of an apparent sale, never to pay for the goods. If, however, the sale be induced by false representations made at the time, and relied on by the seller, it may be avoided by the latter at his election. The discussion of these principles in *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599, renders further discussion unprofitable. The record in this case fails to disclose any evidence of false representations made by the defendant at the time the order was given. Neither was there any direct evidence of the defendant's intention not to pay for the goods at the time he made the purchase. The most that can be said of the evidence is that it shows that some months after the purchase the defendant was guilty of acts tending to show a disposition to defraud his creditors. However culpable that may be, it falls short of

proving the preconceived intent necessary to avoid the sale. In the absence of clear proof of known insolvency or of false representations made to induce the sale, evidence of an intent to defraud creditors, formed some months after the sale, is not sufficient to justify an inference of a predetermined intent not to pay for the goods purchased. The facts herein fail to meet the standard required by law. The trial court was justified in the conclusion reached.

By the Court.—The judgment is affirmed.

WEGNER, Appellant, vs. RISCH, Respondent.

April 3—April 22, 1902.

False imprisonment: Nominal damages.

Upon testimony tending to show that although technically the defendant, a policeman, had unlawfully deprived plaintiff of her liberty, yet that he had arrested her because he believed her insane and in need of care for her own safety; that she suffered no indignity other than transportation in the patrol wagon to the station house; and that before the arrest she was momentarily exposing herself on the streets to a far higher degree of notoriety and disgrace,—it is *held* that there was no abuse of discretion in refusing to set aside as inadequate a verdict for nominal damages.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

Action for false imprisonment. The evidence tended to show that early of a Sunday morning, before 4 o'clock, the plaintiff was rambling about the neighborhood of the beat of the defendant, who was a policeman in the western part of Milwaukee, in a manner to excite attention and suspicion. Upon inquiry, she somewhat incoherently stated a desire to find a man from whom she wanted to get some money, and at last, under the guidance of the defendant, found the house,

and entered into colloquy with the man on the subject of money. He told the policeman that she was crazy. The policeman left them in violent controversy. Shortly afterward his attention was called to her in another part of his beat by persons who had observed her wandering aimlessly about, and who suggested that she needed to be taken care of. The defendant talked with her again. She told him she lived on Jackson street, far on the other side of the city, but could not tell where on Jackson street. He urged her to go home, and then told her that if she would not go home he would have to send her to the station, to which she responded, "All right." He accordingly conducted her to the nearest patrol box, called a wagon, and turned her over to it with the explanation that she had been acting strangely and he had arrested her for safekeeping. She was then taken to the station house, where she was not confined, but remained something like an hour, gave her residence, and was allowed to go home. According to the evidence of the defendant's witnesses, there was much to justify the belief that the woman was demented and unfit to care for herself or be at large. The plaintiff's testimony gave a very different color to the whole transaction. The jury found a verdict for the plaintiff, and assessed her damages at six cents, which verdict her attorneys moved to set aside on the ground of inadequacy of damages. That motion being overruled, judgment was entered on the verdict, from which the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Ernest Bruncken,* attorney, and *A. C. Umbreit* of counsel, and for the respondent on that of *Fiebing & Killilea.*

Dodge, J. After careful examination of the record, we feel constrained to the conclusion that the trial court was guilty of no abuse of his discretion in refusing to set aside the verdict on the plaintiff's motion. Conceding, as perhaps the evidence establishes without controversy, that there was

technically an unlawful arrest, in that the plaintiff was committing neither any crime nor a breach of the peace, yet the defendant's testimony that he arrested her because he believed her insane and in need of care for her own safety is of course sufficient to support such view of his conduct by the jury. In the absence of any violence and of any indignities other than the mere peaceful and orderly transportation of the defendant to a place of safety, when she was momentarily exposing herself to a far higher degree of notoriety and disgrace, although technically an unlawful deprivation of her liberty, we cannot say that the jury acted wholly outside of their proper province in finding only nominal damages. The rules of law which place that question more than all others in the hands of a jury are too trite to need more than suggested reference. *Henderson v. McReynolds,* 38 N. Y. St. 734, 14 N. Y. Supp. 351, and *Bradlaugh v. Edwards,* 11 C. B. (N. S.) 377, present extreme illustrations of cases in which courts have declined to set aside verdicts for nominal damages. In this case the spoken evidence was, of course, much supplemented to the jury and the trial court by the personal appearance both of the plaintiff and defendant; and that court having, in its discretion and with these advantages, approved the jury's action, we cannot, in the light of any information contained in the record, overrule his conclusion, whether as an original question we might or might not have reached the same conclusion.

By the Court.—Judgment affirmed.

SCHOMBERG HARDWOOD LUMBER COMPANY, Appellant, vs. ENGEL, Respondent.

April 4—April 22, 1902.

Appeal: Defective return: Dismissal: Garnishment.

1. Where a part of the papers used by the parties on a motion, and upon which an order appealed from was based, have not been transmitted to this court, as required by sec. 3050, Stats. 1898, and Supreme Court Rule V, the appeal will be dismissed.
2. The principal defendant, having the right under sec. 2765, Stats. 1898, to defend the garnishee action, may appear specially and move to dismiss the action against the garnishee.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Dismissed.*

For the appellant there was a brief by *J. F. Woodmansee,* attorney, and *Lyman G. Wheeler,* of counsel, and oral argument by *Mr. Woodmansee.*

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* and *Wheeler P. Bloodgood* of counsel, and oral argument by *Wheeler P. Bloodgood.*

CASSODAY, C. J. It is undisputed that April 30, 1901, and upon the requisite affidavit on behalf of the plaintiff, the garnishee summons in this action was duly served upon the Tegge Lumber Company by the sheriff, who returned and indorsed thereon his failure to find *George Engel,* the principal defendant, for service after due diligence used for that purpose; that May 27, 1901, the attorneys for *George Engel* appeared specially for the purpose of the motion only, and for no other purpose, and obtained from the trial court an order to show cause why the service of the summons therein should not be set aside and vacated, and the action dismissed. The order to show cause was based upon the records, files, and proceedings therein, and the affidavit of Wheeler P. Blood-

good, thereunto annexed, which stated, in effect, such special appearance for *George Engel;* that he was at the time a resident of Cadillac, Michigan, and had his place of business at Grand Rapids, Michigan; that such facts were well known to the plaintiff at the time of the commencement of the action, and the making of the affidavit for publication on file therein, and the fact of such residence and place of business in Michigan, so stated therein; that no summons had ever been issued in the principal action; that no action had ever been commenced by the plaintiff against *George Engel;* that all papers on file were entitled in the garnishee action; that at the time of making the order of publication (May 4, 1901) no complaint had been made or filed in the principal action, nor any affidavit upon which to base such order; that the papers so on file therein failed to describe or specify any property of *Engel* within the state of Wisconsin, or to describe any property alleged to belong to him within the state liable to be seized on attachment or execution, or reached by garnishment process.

In answer to such order to show cause, the attorney for the plaintiff presented an affidavit to the effect that April 27, 1901, a summons in the principal action was made, signed, and held by him for the purpose of making due service on *George Engel* in case he came to this state; that April 29, 1901, he issued the garnishee summons, as stated; that April 27, 1901, he prepared a summons, complaint, affidavit, and order for publication, but discarded them when he was informed by an attorney in Milwaukee that they were improperly entitled in the garnishee action.

Upon such moving papers, and upon the records, files, and proceedings therein, and upon motion of the attorneys for *George Engel,* it was, June 29, 1901, ordered by the court that the purported service of the summons in the action, and in what purports to be the principal action, although entitled as in the garnishee action, be, and the same were thereby, set

aside and held for naught; and it was further ordered that the action, and the principal action, be, and the same were thereby, dismissed; and it was further ordered that the plaintiff therein pay to the attorneys for the defendant $10 costs of such motion. From such order the plaintiff brings this appeal.

The respondent moves to dismiss the appeal on the ground that a part of the papers used by the respective parties, and upon which the order appealed from was based, have not been transmitted to this court, as required by the statute and Rule V of this court. Sec. 3050, Stats. 1898. As indicated, the motion was based upon the affidavit of Wheeler P. Bloodgood, as well as "upon the records, files, and proceedings" in the garnishee action. That affidavit refers to the complaint, affidavit, and order for publication made and filed in the principal action. Neither of those papers is here. The excuse is that they were entitled in the principal action. But the order appealed from is based upon such "moving papers," as well as "upon the records, files, and proceedings" therein, and hence includes such complaint, affidavit, and order for publication. By reason of their absence from the records we are precluded from considering the order upon the merits. *Glover v. Wells & Mulrooney G. Co.* 93 Wis. 13, 66 N. W. 799; *Hoffman & Billings M. Co. v. Burdick,* 95 Wis. 342, 70 N. W. 470; *Superior C. L. Co. v. Superior,* 104 Wis. 463, 80 N. W. 739; *Ryan v. Philippi,* 108 Wis. 254, 83 N. W. 1103. Under these adjudications, it becomes our duty to dismiss the appeal. As indicated, the principal defendant appeared specially in the case. Under the statute he had the right to defend the garnishee action as well as the principal action. Sec. 2765, Stats. 1898. Certainly he was authorized to make the motion to dismiss.

By the Court.—The appeal from the order of the circuit court is dismissed.

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CITY OF MILWAUKEE, Respondent, vs. HERMAN ZOEHRLAUT LEATHER COMPANY, Appellant.

April 4—April 22, 1902.

Municipal corporations: Water supply: Recovery for water taken clandestinely: Capacity to sue: Authority of city attorney: Pleading.

1. A municipal corporation authorized by law to maintain waterworks and furnish water to private consumers has the right to sue and recover for water taken and not paid for, the same as an individual or a private corporation.
2. Although a city has established water rates and is empowered to collect such rates as taxes are collected, it may nevertheless recover the value of water clandestinely taken from the mains, in an action for conversion.
3. A provision in a city charter that "the city attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the common council," does not affect the question of the city's legal capacity to sue; and the objection that the city attorney had not been ordered by the council to commence an action is not ground for demurrer, but must be raised, if at all, by answer.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This is an action to recover the value of water alleged to have been wrongfully and clandestinely taken from the water mains of the city by the defendant. The complaint alleged, in substance, the corporate character of the city as a municipal corporation, and that it was by its charter empowered to erect and maintain waterworks for supplying pure water to the inhabitants of said city; that in pursuance of said power the city had erected and maintained waterworks, and had for many years furnished water to the inhabitants of said city, for domestic or manufacturing purposes, through pipes or mains laid in the streets thereof; that the defendant, a domestic manufacturing corporation, for years had main-

tained and operated a tanning business upon certain lots adjoining certain streets of said city, upon which streets water mains existed; that in September, 1884, the plaintiff city adopted certain rules and regulations governing the supply and use of said water, and also fixed certain rates for such use, which rules, regulations, and rates are attached to the complaint as exhibits; that the defendant commenced about the 1st day of January, 1893, to wrongfully take and use water from the said water mains, and continued to take and use the same up to the 7th day of January, 1901, by means of connections wrongfully made by the defendant with the said water mains without the knowledge of the said city; that the amount so clandestinely taken and used by the said defendant between January 1, 1893, and February 13, 1899, was 6,143,700 cubic feet, and the amount so taken and used between February 13, 1899, and January 7, 1901, was 1,906,150 cubic feet, and that by reason of the taking of said water the defendant became indebted to the said city in the gross sum of $3,601.95, for which sum and interest judgment was demanded. The defendant demurred to the complaint upon the general ground of insufficiency of the facts, and upon the further ground that it appeared that the plaintiff had no authority to sue, in that the common council of said city had not authorized the commencement of the action. The demurrer was overruled, and the defendant appeals.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *J. D. Goff.*

For the respondent there was a brief by *Joseph B. Doe,* assistant city attorney (*Carl Runge,* city attorney), and oral argument by *Mr. Doe.*

WINSLOW, J. This is an action to recover the value of "stolen waters." Whether they were sweet or not does not appear; but it is distinctly charged that they were the property of the city in its mains, and that they were clandestinely

appropriated by the defendant to its own use, and have never been paid for. If the water alleged to have been taken belonged to an individual or a private corporation authorized to deal in water, we apprehend there would be no question raised as to the right of recovery. The fact that the plaintiff is a municipal corporation cannot logically affect the right to recover, so long as it is endowed by law with the power to maintain waterworks and furnish water to private consumers. The water in its pipes is property, it belongs to the city, it is of some value, and it is charged to have been taken by the defendant and never paid for. This makes a complete case, on very well established legal principles. Nor can the fact that the city has established water rates and is empowered to collect such rates from consumers as taxes are collected, affect the right to recover the value of water taken in defiance of the city's regulations. That method of payment was primarily intended for water sold by the city to consumers in accordance with its rules. Granting that this method may be used also to recover payments for water clandestinely taken and converted, it cannot logically be held that it excludes the previously existing common-law remedy by way of an action for conversion. This proposition seems too clear for argument or discussion.

Nor can the objection that the city has not legal capacity to sue prevail. This objection seems to be based upon a legal misconception. The argument in favor of the objection runs thus: The city charter provides that "the city attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the common council." Sec. 5, subch. III, ch. 184, Laws of 1874. It is not alleged in the complaint that the city attorney has been "ordered by the common council" to commence this action; hence the city has no legal capacity to sue. The argument is plainly a *non sequitur*. The city is given the power to sue

and be sued, in express terms, by its charter. Sec. 1, subch. I, ch. 184, *supra*. By this provision it is fully endowed with legal capacity to sue. If its legal representative must, under the charter, be specially directed to bring an action, before he is empowered to launch the city into litigation (a point not decided), still the city's legal capacity to sue is unaffected. The objection that no such authority has been given goes simply to the attorney's authority, and the statute nowhere dignifies this objection into a ground for demurrer. If it be a good objection, it must logically be raised by answer.

By the Court.—Order affirmed.

HUPFER, Administrator, Respondent, vs. NATIONAL DISTILLING COMPANY, Appellant.

April 4—April 22, 1902.

Negligence: Dangerous premises: Injury to person there on business: Evidence: Photographs.

1. Plaintiff's intestate was upon the premises of defendant, a distilling company, to purchase slops, which were to be drawn from a large circular vat into his wagon. He was standing upon the platform of the vat for the purpose of stirring the slops therein, when the vat burst and he was scalded to death by its contents. Defendant had an employee whose duty it was to stir the slops, but it was a custom, known to and acquiesced in by defendant, for customers to stir them for themselves if they wished, and the deceased had repeatedly been allowed to do so. *Held*, that deceased, being where he was by defendant's permission and upon business for their mutual benefit, was not a mere licensee, and defendant was liable for his death if the dangerous condition of the vat was known to it or discoverable by the exercise of ordinary care.
2. Photographs of hoops claimed to have been upon the bursted vat are held to have been improperly admitted, because the evidence (discussed in the opinions) did not sufficiently identify the objects photographed as the hoops in question.

3. Such photographs, if they had been shown to represent correctly the hoops of the vat, would have tended to show that some of such hoops were, at the time of the accident, rusted to such an extent as to destroy or partially destroy their efficiency, and that such condition could readily have been discovered by the exercise of ordinary care; and would have supported a finding of the jury that defendant ought to have known of such defective condition of the hoops prior to the accident. [BARDEEN and MARSHALL, JJ., are of the opinion that, even if admissible, such photographs were not sufficient, as against the overwhelming evidence to the contrary, to sustain such a finding. MARSHALL, J., is further of the opinion that, even if the objects pictured had been properly identified, the photographs were not admissible as the *sole* evidence of the condition of the hoops, such fact being susceptible of better proof by the testimony of witnesses.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an action to recover damages for negligently causing the death of the plaintiff's intestate, Simon Hupfer, September 13, 1899. Aside from the formal parts, the complaint alleges, in effect, that on the day named Simon came to the defendant's distillery, as he had for some time been accustomed to do, for the purpose of purchasing and receiving slops for his cows, which slops were contained in a large circular tank about sixteen feet in diameter and raised about six feet above the ground, and drawn therefrom by a faucet at the bottom of the tank; that Simon drove his wagon under and by the side of the tank for the purpose of so filling his wagon with such slops; that without his knowledge or any warning to him, and through the carelessness and negligence of the defendant, the hoops which held the tank together had become rusted and weakened, so that the tank broke, and the contents thereof were precipitated upon Simon, scalding him in such a dangerous and shocking manner that he died about three hours afterwards.

The answer consists of admissions, denials, and counter allegations, to the effect that Simon refused to allow the de-

fendant's employees to stir the slops in the tank, but insisted upon being present at the tank and stirring the slops therein himself, and by his doing so his own carelessness and negligence contributed to his injury and death.

At the close of the trial the jury returned a special verdict, to the effect (1) that Simon Hupfer received injuries by the bursting of the defendant's slop vat, September 13, 1899, from which he died; (2) that the hoops on the vat at the time of the accident were rusted, so as to be defective and unfit for the purpose for which they were used; (3) that the defendant did not know of such defective condition of the hoops prior to the accident; (4) that the defendant in the exercise of ordinary care ought to have known of such defective condition of the hoops prior to the accident; (5) that such defective condition of the hoops was the proximate cause of the injury; (6) that September 13, 1899, it was a long-established custom for defendant's customers, desiring to purchase feed to be delivered from the vat in question, to stir the feed for themselves, if they desired to do so; (7) that such custom was known to, and acquiesced in by, the defendant; (8) that the defendant's customers, prior to the accident, did know that the defendant had provided a person whose duty it was to stir up the slop in the vat and deliver the same to the customers of the defendant; (9) that the deceased, prior to the accident, did know that the defendant had made it the duty of John Dardell to stir up the slop in the vat and deliver the same to the customers of the defendant; (10) that the defendant, prior to the accident, did repeatedly suffer the deceased to step upon the back platform and stir up the slop, and did suffer the deceased to do so because it feared to lose the custom of the deceased if it should forbid him; (11) that the deceased, in the exercise of ordinary care, ought not to have known of such defective condition of the hoops prior to the accident; (12) that the deceased was not guilty of a want of ordinary care which proximately contributed to the

injury; (13) that they assessed the plaintiff's damages at $1,000.

From the judgment entered thereon for the amount stated, the defendant brings this appeal.

For the appellant there was a brief by *O'Connor, Schmitz, & Wild,* and oral argument by *A. J. Schmitz.* They argued, among other things, that at the time of the accident the deceased was a mere licensee to whom the defendant owed no duty, and that the defendant is not liable in damages on account of his injury. *Cahill v. Layton,* 57 Wis. 600; *Truax v. C., St. P., M. & O. R. Co.* 83 Wis. 547; *Gorr v. Mittlestaedt,* 96 Wis. 296; *Peake v. Buell,* 90 Wis. 508; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105; *Cole v. McKey,* 66 Wis. 500; 1 Thompson, Neg. sec. 5, p. 307; *Vanderbeck v. Hendry,* 34 N. J. Law, 467; *Reardon v. Thompson,* 149 Mass. 267; *Bennett v. L. & N. R. Co.* 102 U. S. 577; *Parker v. Portland P. Co.* 69 Me. 173; *Gaffney v. Brown,* 23 N. E. 233, 150 Mass. 479; *Trask v. Shotwell,* 41 Minn. 66, 42 N. W. 699; *Zoebisch v. Tarbell,* 87 Am. Dec. 660, 10 Allen, 385; *Davies v. Central Cong. Soc.* 129 Mass. 371; *Johnson v. B. & L. R. Co.* 125 Mass. 79; *Severy v. Nickerson,* 120 Mass. 306; *Pierce v. Whitcomb,* 21 Am. Rep. 120; *Sweeney v. O. C. & N. R. Co.* 10 Allen, 368; Shearm. & Redf. Neg. (5th ed.), § 705; Buswell, Pers. Inj. § 93; *Ill. Cent. R. Co. v. Griffin,* 80 Fed. 280; *Barker v. Boston E. L. Co.* 178 Mass. 503, 60 N. E. 2; *Weldon v. P., W. & B. R. Co.* 2 Penn. (Del.) 1, 43 Atl. 95; *Tully v. P., W. & B. R. Co.* 2 Penn. (Del.) 537, 50 Atl. 95.

For the respondent there was a brief by *Lindley Collins* and *Joseph B. Doe,* and oral argument by *Mr. Doe.*

CASSODAY, C. J. 1. It is contended that the deceased was, at the time and place of the injury, at most a mere licensee, to whom the defendant owed no duty. It is true that the defendant had in its employ at the time one John Dardell,

whose special duty, among other things, was to stir up the slop in the vat and deliver the same to the defendant's customers. By the eighth and ninth findings the jury found that prior to the accident the deceased and the defendant's other customers knew that such were the duties of John Dardell. But by the sixth, seventh, and tenth findings, the jury also found that at the time of the accident it had long been an established custom for the defendant's customers, desiring to purchase such slops, to stir the same for themselves, if they desired to do so; and that such custom was known to and acquiesced in by the defendant; and that prior to the accident the defendant repeatedly suffered the deceased to step upon the back platform and stir up the slop, because it feared to lose his custom if he should be forbidden. John Dardell testified to the effect that he told the defendant's secretary that if some of the customers were not allowed to stir the slops themselves such customers would not take them; that the secretary told him not to drive customers away, but that he would rather he would stir the slops himself; that he had known the deceased for three years; that in the winter he came for slops almost every day, but seldom in the summer; that he often told the deceased that his duties required him to stir the slops, but that the deceased always stirred the slops himself; that by doing so he would get the thick slop, while other customers, who did not stir it themselves, would get thinner slop; that he knew that the deceased would not take the slop unless he stirred it himself, and so he let him stir the slop and fill his wagon rather than lose him as a customer; and that he regarded that as business.

Upon such findings and testimony, can we hold that the deceased was a mere licensee within the authorities? *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626, 11 N. W. 55; *Cahill v. Layton,* 57 Wis. 606, 617, 16 N. W. 1; *Truax v. C., St. P., M. & O. R. Co.* 83 Wis. 547, 53 N. W. 842; *Johnson v. Lake Superior T. & T. Co.* 86 Wis. 64, 56 N. W. 161;

Mason v. C., St. P., M. & O. R. Co. 89 Wis. 151, 61 N. W. 300; *Gorr v. Mittlestaedt,* 96 Wis. 298, 71 N. W. 656. In one of the elementary works cited by counsel for the defendant, the rule applicable is stated thus:

"If a person enters upon premises on business to be transacted with the owner or occupant thereof, or by the procurement of the owner or occupant, and, being himself in the exercise of due care, is injured by reason of the unsafe condition of the premises or the approaches thereto, such unsafe condition being known, or such as ought to have been known, to the owner or occupant, the latter will be answerable in damages for such injuries." Buswell, Pers. Inj. § 66, citing numerous cases.

Among the cases cited in support of the proposition are the following: *Donaldson v. Wilson,* 60 Mich. 86, 26 N. W. 842; *Samuelson v. Cleveland I. M. Co.* 49 Mich. 164, 13 N. W. 499; *Carleton v. Franconia I. & S. Co.* 99 Mass. 216; *Bennett v. Railroad Co.* 102 U. S. 577, 584, 585. In the first of these cases it was held that "a landowner is liable to respond in damages to one who, using due care, comes upon his premises at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for injuries sustained by reason of the unsafe condition of such premises, known to him, and which he has suffered negligently to exist, but of which the injured party has no knowledge or notice." In the last it is said, quoting from an author, that "the principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." Similar views are expressed in Mr. Thompson's late Commentaries on the Law of Negligence (vol. 1, § 968), citing numerous cases in support of the rule. We must hold that, under the findings of the jury, the deceased cannot be regarded as a mere licensee, but that he was there on business for the mutual benefit

of himself and the defendant; or, in other words, by invitation. There is evidence tending to support such findings.

2. By the third and fourth findings the jury found, in effect, that the defendant did not know of the defective condition of the hoops prior to the accident, but that it ought to have known of such defect prior to the accident. It is claimed that the evidence is insufficient to support this last finding. It appears that the tank was constructed in 1894; that the average life of such a tank used as that was without necessitating repairs was ten years or more; and that that tank was inspected and found in good condition in June or July prior to the accident. Of course, if the defect was latent and unknown to the defendant, and undiscoverable by the exercise of ordinary care on the part of the defendant, then there would be no liability. *Smith v. C., M. & St. P. R. Co.* 42 Wis. 520; *Morrison v. Phillips & C. C. Co.* 44 Wis. 405; *Spille v. Wis. B. & I. Co.* 105 Wis. 340, 81 N. W. 397. But if the photographs were properly admissible in evidence, then there was evidence tending to prove that some of the hoops on the tank were, at the time of the injury, rusted to such an extent as to destroy or partially destroy the efficiency of such hoops, and that such condition could readily have been discovered by the exercise of ordinary care on the part of the defendant.

3. The defendant's secretary testified to the effect that the photographs correctly represented the location of the tank, the office building, the roadway, and the plant. The photographer testified to the effect that Exhibit C was a correct representation of the hoops as they were September 18, 1899,—five days after the accident; that they were rusty, with some slops or grain on them; that he took Exhibits D and E on the same day; that they represent the hoops that came from the vat that burst, and were in the yard where he took photographs of the whole lot; that they represent parts of

the same lot as Exhibit C, and taken at the same time; that when he took Exhibit D he noticed that there were rust spots, or that the hoops were rusted through, and in order to show the holes he took pieces of paper and stuck them on the back, so that the holes would appear in the picture; that the other white spots represent slops or grain; that the spots marked round with ink represent holes, and the others slops; that Exhibits D and E correctly represent what they were intended to represent; that Exhibit E shows how far the hoops were eaten through by rust; that they were in the back yard, where there was nothing but rubbish and weeds, where he took the photographs. The defendant's engineer testified to the effect that after the explosion the hoops from that tank were placed back in the yard, in the distillery grounds back of the old warehouse; that Exhibit C was the back yard and about the place where he directed the hoops to be put; that they were placed there, he guessed, about three days after the accident; that he saw them placed there personally; that there were some hoops there at the time; that they had more than one slop vat, but only one that burst about that time, and the hoops of which had been removed there within a few days; but that he did not know whether the hoops shown in the photograph came from the vat in question; that he did not point out those hoops to the photographer; that if he remembered correctly he showed one of the attorneys for the plaintiff where those hoops were a few days after the accident; that he did show some one the hoops that came from the vat, within a few days after the accident, but did not show them to more than one party where they were, nor to any one with a camera. Upon such evidence the three photographs mentioned were admitted in evidence, against the objection that the hoops shown in the photographs had not been identified as the hoops which came from the exploded vat in question. After careful consideration we are forced to the conclusion

that such objection was well taken and was improperly overruled. This court has recently and repeatedly considered the question of admitting photographs in evidence, and the effect to be given to them as evidence when admitted. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 324, 325, 80 N. W. 644; *Selleck v. Janesville,* 104 Wis. 570, 574, 575, 80 N. W. 944; *Mauch v. Hartford,* 112 Wis. 40, 48–50, 87 N. W. 816, 819, 820. It is unnecessary to add anything here to the discussion.

Other questions suggested do not seem to be of sufficient importance to call for special consideration.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

BARDEEN, J. The relation between the deceased and defendant was more than that of a *mere* licensee. The defendant owed him the duty of active vigilance to the extent of using ordinary care in discovering and informing him of dangers. The jury found that the defendant did not know of the defective condition of the hoops on the vat, but that in the exercise of ordinary care it ought to have known of their condition prior to the accident. I think the evidence is overwhelmingly against this last finding. The undisputed evidence is that the vat was built in 1894; that the average life of such structures was ten years; that the materials of which this vat was constructed were first class; that it had been painted with mineral paint at the time it was set up, and at least once since that time; and that it was carefully inspected in June or July prior to the accident, and showed no appearance of rust or defects. Admitting that the photographs were properly admissible in evidence, they were not sufficient, in my judgment, to overcome the force of opposing evidence. To allow a recovery on the evidence in this case is equivalent to making the defendant an insurer.

MARSHALL, J. I agree that the judgment should be reversed. This personal opinion is written, in part because it seems that the opinion of the court does not make the grounds for the decision rendered sufficiently plain to prevent misconception on some points, and in part because my views are not in harmony therewith. I understand the court holds that it follows as a matter of law, from the findings of the jury to the effect that the deceased was engaged in a business transaction with the appellant when injured, at a place on the latter's premises where he was permitted to be in the pursuit thereof, that he was not a mere licensee; that though he was not, strictly speaking, an invitee as to the particular place he was in, since he was permitted to be there and it pertained to the business in which he and the respondent were interested, his status was at least that of a licensee coupled with a mutual interest of licensee and licensor, not that of a mere licensee, and that such relation carried with it an implied assurance that the place was free from danger discoverable by the exercise of ordinary care. In other words, that the license, being coupled with a business relation, so far as legal rights were concerned, was equivalent to an invitation. There is abundance of authority to support that view, but I do not understand that it includes the cases cited by the court. They are, in the main at least, cases of liability to a mere licensee. To point only to such authorities to support the decision here, it seems, is very misleading,—so much so as to almost certainly lead to error by trial courts. In them the element of business relation, generally, distinguishing a mere licensee from a licensee or invitee, was absent, and the liability was sustained upon the ground that one cannot justly set a trap even for a mere licensee, or conduct his business regardless of the license granted;—upon the doctrine that if a railroad company permits, merely by not objecting, persons to habitually walk upon its tracks where there is no highway, and to do so to such an extent as to render it probable that pedes-

trians may be in the pathway of an approaching train at any time, it should keep a lookout from trains approaching such place and signal such approach when that seems reasonably necessary to warn such pedestrians of its presence. The extent to which that doctrine has been carried by this court is not in entire harmony with authorities elsewhere. Elliott, Railroads, §§ 1251, 1252.

There is a broad difference between a trespasser and a mere licensee; also between a licensee and a mere licensee, as the terms are used in the authorities. A trespasser is a wrongdoer,—one who acts in defiance of or regardless of the rights of another. Let that other give permission to do the act, he having no interest therein himself, directly or indirectly, and the trespasser becomes a mere licensee. Add the element of mutual interest or business relation of some kind, with or without advantage to the owner of the property, and the mere license becomes a license or invitation with a suggestion or assurance of safety, according to circumstances. To illustrate: A railroad company prepares a walk for its passengers to use in approaching to or departing from its trains. Such use is said to be by invitation. The preparation of the path is a suggestion to patrons of the road to approach and depart from trains by that particular way, and an assurance that it is reasonably safe to do so. Persons using a different way to approach or depart from trains customarily, with the knowledge of the company and without its protest, do so without any element of invitation, strictly speaking. There is rather an invitation not to use it, plainly suggested by the specially prepared way. The permissive use of the unprepared way, by itself, constitutes but a bare license, as the term is commonly used. The added element of business relation between licensee and licensor increases the degree of duty on the part of the licensor from that due to a trespasser or mere licensee to that due to an invitee, though there is no

implied suggestion to go outside the prepared way, hence, strictly, no implied invitation to do so. In that we observe all the elements present in this case as indicated by the verdict of the jury, showing as a matter of law that the deceased was not a mere licensee; nor was he, strictly speaking, an invitee, but he was a licensee with the added element of business relation between licensee and licensor. The duty to him in such circumstances, however, under the authorities, was substantially the same as that due to an invitee, not that due to a person circumstanced as were the plaintiffs in the cases cited.

Johnson v. Lake Superior T. & T. Co. 86 Wis. 64, 56 N. W. 161, turned on the duty of a railway company to a person walking upon its track, where pedestrians were accustomed to travel by permission of the company and might, under the circumstances, be reasonably expected to be at any time. It was said that he was not a mere trespasser, but it was not intimated that he could be regarded as occupying, in any sense, defendant's premises by invitation. In *Cahill v. Layton,* 57 Wis. 600, 16 N. W. 1, another case cited to support the ruling here, the deceased was a licensee without the element of business relation with the licensor, in every sense a mere licensee, and it was held that bare permission by one person to another to use his premises for any purpose does not carry with it a duty to maintain the premises in a reasonably safe condition for the permitted use. The court there drew a distinction between mere omission to inform a bare licensee of danger in his way, and acts on the part of a licensor rendering enjoyment of the license dangerous, there being breach of duty in the former, but not in the latter. The idea is that expressed in authorities quite generally, that one cannot be actively negligent toward a mere licensee. It is said that much confusion exists in American cases, partly by failure to distinguish between mere passive and active conduct in respect to a mere licensee; that while such a licensee

is bound to enjoy his license upon the premises over which his license extends as he finds them, the licensor owes him a duty, while the right of enjoyment exists, not to actively render it dangerous. *Bennett v. Railroad Co.* 102 U. S. 577; *Ellsworth v. Metheney,* 44 C. C. A. 484, 104 Fed. 119; *Felton v. Aubrey,* 20 C. C. A. 436, 74 Fed. 350.

From what has been said it will be seen that appellant's contention that the verdict of the jury and the evidence do not show that it was under any duty of active vigilance to discover those things that were discoverable by the exercise of ordinary care to that end, and to have informed deceased thereof, because he was only a licensee—was not in the place of danger by invitation,—is not satisfactorily answered by pointing to the cases holding that a licensor owes a duty to his mere licensee not to render the enjoyment of his license dangerous by active negligence, as by running a railway train regardless of the probability of the presence of persons on the track where it has been customarily used as a traveled way. No active negligence is claimed in this case. Breach of a duty to be actively vigilant to discover dangers that were discoverable by the exercise of ordinary care, and to inform the licensee thereof, is claimed. If the sole test of liability were whether deceased was in the place of danger by invitation, strictly speaking, either express or implied, the result would necessarily be in favor of the defendant. There is nothing in the evidence to suggest such invitation, but there is ample evidence to show permission. The test of whether the verdict, on its face, shows breach of duty to be actively vigilant is whether the status of the deceased in respect to appellant was other than a trespasser or bare, or mere, licensee. If he was neither because of the relations between the two, it is immaterial whether he was in the place of danger by permission or by invitation, strictly so called. Counsel for appellant brought this appeal on the theory that if the deceased was not in such place by implied suggestion, he

was necessarily a bare licensee. That is wrong. Suggestion, strictly speaking, to go or come into the place, is essential to invitation, not to permission. But where permission, without such suggestion, is coupled with the element that creates the duty of active vigilance as regards the safety of a visitor by invitation, the permission is a legal equivalent to invitation, because it carries with it a similar suggestion of reasonable safety.

If it were necessary much authority could be produced to support the foregoing proposition. I will refer to them but briefly. One of the most satisfactory decisions in the books, as regards the particular circumstances of the case before us, is *Holmes v. N. E. R. Co.* (1869) L. R. 4 Exch. 254. The plaintiff there was injured while unloading coal at the defendant's track, the coal having been shipped over its line. There was a usual and provided way for conducting the unloading operations. Plaintiff, being unwilling to wait for his turn to be accommodated in such way, which was to first shunt the coal from the car into a cell by the side of the track and then draw therefrom, informed the station master that he would take some coal for immediate use directly from the car. That required him to mount the car. He was permitted to do so by mere silence of the master with knowledge of the operation. After removing the coal plaintiff descended from the car to a flagged way along which patrons were accustomed to walk in voluntarily assisting in the unloading operations in the usual way. In doing so he stepped upon a loose flag, of which the defendant knew or ought to have known, and was injured. The defendant claimed that the plaintiff was a mere licensee and could not, therefore, legally charge the former with actionable negligence, since it did not wilfully or wantonly injure him. In defining the plaintiff's status, CHANNELL, B., said:

"Where a person is a mere licensee he has no cause of action on account of dangers existing in the place he is per-

mitted to enter. In one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word 'mere' has a very qualifying operation; . . . and this prevents the case from being that of one who is a mere licensee."

CLEASBY, B., said, in effect, that the mere fact that the ordinary way of unloading the coal was departed from was not material to the defendant's duty to the plaintiff, since the way chosen by the latter was known and assented to by the former; and further: "The question of a mere license does not arise; for as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes." KELLY, C. B., speaking for the court in chief, said, in substance, that since the conduct of the plaintiff was in pursuit of business relations with the defendant, the permission, by not objecting, for the former to depart from the usual way of unloading the coal, made the latter responsible for the safety of the way chosen, to the same extent as that of the usual way. In *Bennett v. Railroad Co.* 102 U. S. 577, the distinction is clearly recognized between a mere licensee and an invitee in the technical sense, or one in the broad sense of including all persons entering upon the premises of another in the transaction of business with him by some other than the ordinary and suggested way, but one permitted and ordinarily used. It is held that in each of the latter situations there is an implied assurance of safety as regards all dangers known to the proprietor or discoverable by the exercise of ordinary care. Elliott, Railroads, §§ 1248, 1249, points out the same distinctions; and that while invitation implies license, license does not necessarily imply invitation; that mere sufferance does not constitute license, nor license invitation. Where there is mere permission by the occupier of property to another to come upon it, there being no mutuality of interest in the subject to which the latter's visit relates, the visitor is a mere licensee. Add the omitted element, and he is a licensee and an invitee. Pursuing the author's line of reasoning, we should say: Add the further

element of proceeding, while on the premises by invitation, beyond the region of suggestion, but by permission, the business relation still continuing and the visitor acting in pursuit thereof, and there is license implying assurance of safety so far as legal rights are concerned—invitation, so far as legal liabilities are concerned,—though that element, in the technical sense, is absent.

From what has been said it will be seen that the deceased, according to the verdict, was not a mere licensee, nor was he engaged in manipulating the contents of the tank when the accident occurred by implied suggestion essential to invitation in the general sense of the term; but he was so engaged by the assent of the defendant essential to license, and was lured into the place of danger by reason of his business with appellant. That carried with it legal responsibility for the safety of such place as regards dangers known or discoverable by the exercise of ordinary care. There was the same implied assurance of safety as there would have been if it had been part of the regular duties expected of customers to aid in delivering the subject of the deal between the parties, to do as the deceased was doing when the accident occurred. In this respect the case is precisely like the English case from which we have quoted at considerable length.

In reaching the conclusion as to whether the photographs were properly admitted in evidence, two propositions were considered: first, whether the objects represented in the photographs were sufficiently identified as being the remnants of the hoops which came from the vat, to render the pictures competent evidence; second, whether the purpose of the admission of the photographs was legitimate, such purpose being to prove the substantive fact of the defective condition of the hoops, no other evidence being offered on the subject by respondent. As I understand the result, the court decided the first proposition in favor of appellant, and the second in favor of respondent, holding that the ruling of the court below ad-

mitting the pictures in evidence was wrong because of insufficient proof that they represented the alleged defective condition of the hoops; but that if such proof had been sufficient it would have been competent to establish their faulty condition by the photographs alone. The legal standard of certainty by which the evidence of identification should be tested is not stated, and the substance of such evidence, found in the record, is so given as to lead to the inference, I fear, that it is held insufficient because not substantially all one way—not sufficient to establish the fact of identity to a reasonable certainty, leaving no duty whatever for the jury to perform on the question of whether the photographer found the right hoops or not. No reason is given in support of the decision on the second proposition, other than by pointing to *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 324, 80 N. W. 644; *Selleck v. Janesville,* 104 Wis. 570, 80 N. W. 944, and *Mauch v. Hartford,* 112 Wis. 48, 50, 87 N. W. 816, which do not seem to cover the subject. For the reasons stated, I feel called upon to express my personal opinion in regard to such matters.

I will first treat the last subject above mentioned. In the *Baxter* and *Selleck Cases* the photographs were used to aid the jury in better understanding evidence given from the mouths of witnesses as to the condition of the things pictorially represented. In the *Mauch Case* the photograph, an X-ray picture, was used to show the condition of the object represented therein, there being no other way by which definite evidence in regard thereto could be produced. In other words, it was held to be the best evidence the nature of the case was susceptible of. Here the situation is very different. The condition of the hoops was a subject of easy proof in the usual way. All the cases cited and all authority on the subject are to the effect that photographs are not admissible in evidence for all purposes. As a rule they are to be used to aid the jury in understanding and coming to a proper conclusion upon other evidence. No court, so far as I know, has

gone so far as to hold that photographs can be used as the sole means of establishing essential facts which are susceptible of proof, and are commonly proved, in judicial proceedings, by sworn testimony given by witnesses upon the stand. My study of the subject so persuades me that the decision goes too far, that I must dissent therefrom.

In *Baxter v. C. & N. W. R. Co.* the court said there are limits upon the use of photographs as evidence, and there must be in each case some substantial, legitimate reason for a resort to such means of presenting facts to the jury instead of relying upon the usual methods. It was further there said, in harmony with standard text writers and many cases cited, that photographs may be used, "to identify persons, places and things, to exhibit particular locations or objects where it is important that the jury should have a clear idea of the same, and the photographs will better show the situation than the testimony of witnesses, and where the testimony of witnesses will be better understood by the use of photographs, and to detect forgeries, and to prove documents in cases where originals cannot be readily produced." Obviously, none of those purposes fits this case. The photographs were not used to aid the jury in understanding the evidence of witnesses, or to show, better than could have been shown by the evidence of witnesses, the condition of the hoops. Such condition could have been gone into in detail by the examination of witnesses upon the stand and the exercise of the right of cross-examination, so as to elucidate the truth in a much more satisfactory way than by merely putting the pictures in evidence. Certainly, unless we are prepared to remove all limitations upon the use of photographs, the limit was passed in this case, even conceding, for the purposes of the point, that the things pictured were properly identified; for no reason whatever, as it seems, can be assigned to support their use, except that respondent had no other evidence. That is not a legitimate reason, since the fact involved was susceptible of better proof in

the ordinary way, as we have indicated. If all limitations upon the use of photographs are removed, we will have cases presented entirely by pictorial methods, regardless of the facility for proving the facts in issue by oral evidence. No such practice has yet been established. *Mauch v. Hartford, supra,* goes as far as any case in upholding the use of photographic pictures to prove, by them alone, essential facts. The court there, in recognition of the doctrine that some legitimate reason is necessary to warrant such use, assigned as a sufficient reason for that case, as before indicated, that the X-ray photograph was the only means of establishing the fact to which it related, that the nature of the case was susceptible of.

Now a few words on the proposition as to whether the objects photographed were satisfactorily identified as the broken hoops that came from the vat, and why I regard the opinion of the court liable to mislead as to the legal test of the sufficiency of the evidence on the question of competency. What facts are necessary to competency is purely matter of law for the court to determine. The existence or nonexistence of such facts is also primarily a question for solution by the court on evidence. Such evidence, if true, should be sufficient in legal effect to establish such facts. It should be sufficiently persuasive to convince the judicial mind of a fair probability of its truthfulness. In case of conflicting probabilities as to such truthfulness, creating fair doubt on that point, the question involved is one of credibility. That is distinct from the element of competency. Probability of the truthfulness warrants a decision in favor of the latter element, while the evidentiary effect still waits upon the determination of the jury on the question of credibility. Best, Ev. (Intern. ed.), § 132. The conclusion reached by the trial court is as binding on the reviewing court as the verdict of the jury on an issuable fact in the case. That is, it is regarded in such court as a verity unless wrong beyond reasonable controversy. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145. Applying that test to the

evidence of identity of the hoops photographed as being the ones that came from the vat, we must be able to say that it is entirely insufficient, in any reasonable view of it, to sustain the trial court's decision, or that decision should not be disturbed. We cannot say that, from the synopsis of the evidence given in the court's opinion. It starts out by saying that the photographer testified that the pictures represent correctly the hoops as they were September 18, 1899, five days after the accident. In that we have a distinct and clear declaration that the pictures show the hoops that came from the vat. The language of the witness, however, was as follows: "This picture . . . is a correct representation of the hoops which they represent, as they were on the 18th of September, 1899." In that, there is no attempt to state that the hoops photographed are the ones that came from the vat. There is simply a statement that the picture correctly represents the objects photographed. But later the witness said, as indicated in the opinion of the court: The photographs "represent the hoops that came from the vat that burst, and were in the yard where I photographed, where I took a photograph of a whole lot of them, and those here in parts." There is positive identity of the alleged defective hoops as the ones shown in the picture. It was not impaired by anything further said by the witness on his direct examination. The pictures were offered and received in evidence before he was cross-examined, and without any request for the privilege of cross-examination before the question of competency was submitted for decision. If it were not for evidence given by the photographer thereafter, to which no reference is made in the opinion of the court, it would seem that the decision of the trial court could not be disturbed. He said on cross-examination, immediately after the photographs were admitted, that he had no knowledge whatever as to whether the hoops thereby represented were the ones in controversy, except what he was told. He used this language: "From my own knowl-

edge I cannot swear that those hoops which I saw down in the yard below were the same hoops which had before encircled this tub. All I know is that these pieces of hoops or hoops which were shown me in the yard, that they came from this tub, is that some other people told me, and my knowledge is alone and solely based upon that what I have been told. . . . I merely know that when I went down there, that a man first directed me to go . . . down that way. . . . Then we met somebody else that showed us the hoops and went away, and told me they were from the tank." Thereupon counsel for appellant moved the court to strike out all of the photographer's evidence and the photographs. It is easily seen that there was then no satisfactory evidence of the identity of the hoops photographed with those in controversy, none whatever. The question of competency, though once submitted and decided, and properly decided we should say, was not necessarily settled for the trial. It was proper to present it anew at any time and as often during the trial as evidence was produced furnishing reasonable ground therefor. That the motion to strike out should have been granted seems manifest. No one would venture to suggest, seriously, that the photographs were competent evidence upon the strength of mere hearsay evidence, or that the added element shown by the evidence, that the photographer discovered some indications of the broken hoops photographed having been recently in contact with material similar to that which was in the tank when it was ruptured, or the further element shown later during the trial, that the hoops from the vat were thrown into the yard with a mass of waste material of the same kind. After the motion to strike out was decided no proof was given to render the ruling nonprejudicial. The person who pointed out the hoops to the photographer was not called as a witness, or definitely discovered, while there was much testimony as to the age of the hoops and their appearance on the vat before the accident, indicating, we may say, to a moral certainty,

that the photographer photographed the wrong hoops. Not half the natural life of the hoops had elapsed at the time of the accident. They were painted when put on the tank in 1894, again in 1896, and again in 1899, on each of which occasions they were, to all appearances, perfect. The evidence is to the effect that shortly before the accident they were carefully examined for defects and none was found. There is nothing in the record, that I can discover, to discredit that evidence. It is so utterly inconsistent with the hoops being in the condition indicated by the photographs as to render the few circumstances relied upon to show competency without any evidentiary effect.

On the question of whether there is any evidence to sustain the verdict of the jury that appellant was guilty of a failure to exercise ordinary care in respect to discovering that the hoops were unsafe, I agree with what is said in the opinion filed by Justice BARDEEN. I am unable to point to any evidence or circumstance indicating failure of duty on appellant's part. There was nothing in the age of the vat, the quality of the hoops, the manner in which they had been cared for, or their appearance on the tank, to suggest that they were dangerously defective. All the indications up to the time of the accident point to the contrary. As Justice BARDEEN suggests, if we are to say that there was sufficient evidence on the question of competency to overrule the trial court on that question, still the credibility of the pictures as evidence remains to be determined in the light of all the other evidence in the case; and it seems neither the jury nor the court was warranted in deciding that they overshadowed the large amount of evidence that the hoops, when in place on the vat, did not show any serious defects. The mere appearance of some broken, worn-out hoops, not shown unmistakably to be the ones that came from the vat, cannot reasonably successfully impeach the undisputed evidence that those in controversy were comparatively new at the time of the accident, and

the evidence of witnesses who testified with apparent fairness, and, so far as appears, could readily have been confronted with witnesses on behalf of respondent testifying to the contrary, at least on some material points, if they testified falsely. Under the circumstances the photographs were too weak to create a conflict with such evidence. The reasonable inferences in regard to the subject were substantially all one way, as it appears to me. The jury found the other way. It is one of the most important functions of a trial court to intervene in such a situation. Without the existence of that function and a firm exercise thereof, great injustice would be possible. This sufficiently shows my opinion as to how the trial court should have ruled on the motion of appellant for a correction of the verdict and for judgment in its favor, and as to the proper disposition of the case here.

RUGGLES, Respondent, vs. TYSON and others, Appellants.

April 4—April 22, 1902.

Equity: Sale of part of trust estate to discharge liens: Power to order additional sale.

In an action by the owner of a life estate in land against the owners of the estate in remainder, subject to certain contingencies, to obtain judicial authority to sell a part of the property, including all estates therein, in order to prevent a threatened destruction of such estates by tax and other liens, the decree authorized the sale of certain lots specifically mentioned in the complaint and also, in case of necessity, the sale of other lands upon application and order of the court at the foot of the decree. The amount realized from sales of the lots specifically mentioned proved insufficient to discharge the liens. *Held*, that an order authorizing the sale of another parcel for that purpose was within the power of the court and was proper.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

After a decision in this case by this court, reported in 104 Wis. 500, 79 N. W. 766, 81 N. W. 367, and the *remittitur* to the circuit court for Milwaukee county, that court, on July 25, 1900, entered a judgment or decree substantially in accordance therewith, authorizing the sale of the entire title to four certain lots and the application of the proceeds in the manner directed by this court. The decree also authorized the trustee to join with the plaintiff in any other sales or conveyance of other real estate involved in the trust, "upon application and order of this court at the foot of the decree." On September 3, 1901, the trustee appointed by the former decree presented its petition, alleging that, of the four lots authorized to be sold by the decree itself, three and a half lots had been sold; that the prospective purchaser had receded from his intended purchase of the other half of one of the lots; that the amount realized therefrom had been somewhat less than expected, and that the expenses of the preceding litigation and for compensation of guardian *ad litem,* authorized to be paid out of the proceeds, had been greater than expected, so that the net amount realized from the sale of the three and a half lots was not adequate to accomplish the purpose of discharging the liens in the manner prescribed by the decree, so as to save the remainder of the premises. That petition also represented an opportunity to sell an additional lot, to wit, lot 5 in block 96 in the Ninth ward of the city of Milwaukee, for the price of $6,000, which amount is needed, and is believed to be sufficient, to accomplish the purpose for which the original sales were authorized, and which amount would not make the total exceed that for which it was expected the original four lots could have been sold. Upon this petition, on the foot of the decree, the trustee was authorized to make conveyance, with the life tenant, of said lot 5, so as to convey the complete title thereto of all persons existent or hereafter to come into existence in or to said premises. From that order the guardian *ad litem* of the minor remaindermen

brings this appeal, in order to submit to this court the question as to the authority of the circuit court to make such order and to authorize the divesting of all title other than that of the life tenant, *Virginia C. Ruggles.*

The cause was submitted for the appellants on the brief of *Rollin B. Mallory,* guardian *ad litem,* and for the respondent on that of *Quarles, Spence & Quarles.*

DODGE, J. We see no reason to doubt either the power of the circuit court to authorize this additional sale or the propriety of its so doing upon the showing made. By the decision in this court it was expressly pointed out that the effect of the original complaint was to submit to the court of equity, fully and completely, the situation of the trust estate, and to empower it to order such disposition of parts thereof as should be most beneficial to the ultimate purpose of the trust; namely, the preservation of the *corpus* thereof for those entitled thereto upon the termination of the life estate. This, unquestionably, includes the authorization of sale, not only of the specific lots originally mentioned in the complaint as advisable to sell, but such others in substitution therefor as it may have developed can be disposed of more advantageously and more effectively to accomplish the main purpose above suggested. It, of course, is not surprising that anticipation existing at the time of invoking the investigation and action of the court might be disappointed after the lapse of so long time pending its decision, and there must exist both power and duty in the court to meet the changed situation and so act upon existing facts as to accomplish the purpose of its jurisdiction. The mandate of this court in directing decree was not restrictive as to the specific portion of the trust property which should be sold, but only as to the method of the application and preservation of the proceeds thereof. We think the decree, together with the ancillary order on the foot thereof, is entirely within the instructions of that mandate.

By the Court.—Order affirmed.

FRIEDRICH, Respondent, vs. CITY OF MILWAUKEE, Appellant.

April 4—April 22, 1902.

Municipal corporations: Milwaukee city charter: Street improvement: Adoption of resolution: Arbitrary assessment: Unlawful cutting down of street: Liability.

1. Under a city charter providing that no resolution for improving a street without petition shall be voted upon at any meeting of the council held within four weeks from the time of its presentation, such a resolution may be adopted on the twenty-eighth day after its presentation.
2. Under the charter of Milwaukee (secs. 7, 8, subch. VII) the cutting down of a street was unlawful and subjected the city to liability for the consequent injury to abutting property, where the board of public works, in making the required assessment before ordering the work, did not take into consideration the injury which might result to the abutting lots, but, although the cut varied from almost nothing to nearly thirty feet in depth, made an arbitrary assessment of benefits, based solely on the cost of the work, at a uniform rate per foot, except as to two lots, and as to part of one of them made no assessment.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Carl Runge,* city attorney, and *R. S. Witte,* assistant city attorney, and oral argument by *Mr. Witte.*

For the respondent there was a brief by *A. B. May,* attorney, and *C. H. Hamilton,* of counsel, and oral argument by *Mr. May.*

CASSODAY, C. J. This is an appeal from an order overruling a demurrer to the complaint in an action commenced November 9, 1900, to recover damages for lowering Hadley street in front of the plaintiff's premises between First street and Island avenue, in the Thirteenth ward of the city of *Milwaukee.* The facts alleged in the complaint are very

much the same as in the complaint in *Pittelkow v. Milwaukee,* 94 Wis. 651, 69 N. W. 803. The action and proceedings of the board of public works and the common council claimed to be wrongful and unlawful and without authority of law are the same in both cases.

The defendant contends, and the plaintiff concedes, that the cause of action alleged or sought to be alleged is not in equity to enforce a reassessment under the statutes (secs. 1210*d*–1210*f*, Stats. 1898). *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. Both parties agree (to what is very obvious) that this is a straight action at law to recover damages for cutting down the street in front of the plaintiff's premises without any authority of law. In such a case this court has held that "for an unlawful change in the grade of a street a city is liable to the owner of abutting property for all damage directly and proximately caused thereby, without reference to any resulting benefit." *Drummond v. Eau Claire,* 85 Wis. 556, 55 N. W. 1028. In that case it was said that "this court has, in effect, frequently held that where a change of grade in a street is made under authority of law, and with due care, the municipality is not liable for consequential injury to abutting lots, unless made so by statute or the constitution." 85 Wis. 562. The adjudications of this court upon both questions are there reviewed and classified. See, also, *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039; *Walish v. Milwaukee,* 95 Wis. 16, 69 N. W. 818.

The question recurs whether the cutting down of Hadley street in front of the plaintiff's premises was, as alleged in the complaint, wrongful, unlawful, and without authority of law. The action and proceedings of the board of public works and common council in the matter of such improvement are the same as in *Pittelkow v. Milwaukee,* 94 Wis. 651, 69 N. W. 803, and *Pittelkow v. Herman,* 94 Wis. 666, 69 N. W. 805. In the first of these cases it was held, as it must be here, that

the resolution for improving Hadley street without petition, recommended and submitted to the common council by the board of public works May 14, 1894, and adopted by the common council June 11, 1894, was a compliance with sec. 6, subch. VII, of the charter of *Milwaukee* (ch. 184, Laws of 1874, as amended). The question in that case, as in this, arose on a demurrer to the complaint which alleged, in effect,

—"that the board of public works, before ordering the work to be done in front of the plaintiff's premises, did not view the same, or consider the amount proposed to be made chargeable against the same, and the benefits which would accrue to the plaintiff in consequence of the alleged improvement, and did not assess against the premises the amount of benefits which they would derive therefrom when completed in the manner contemplated, and did not take into consideration the injury to, and total destruction of, the plaintiff's premises." *Pittelkow v. Milwaukee,* 94 Wis. 656, 69 N. W. 805.

Assuming such allegations to be true, as we were bound to on such demurrer, we held that the complaint in that case stated a good cause of action. While the complaint in the case at bar alleges that the law made it the duty of the board of public works, before ordering such improvement, to view the premises, as stated in the charter (sec. 7, subch. VII), yet it nowhere alleges, as in the other case, that the board did not view the premises; and the report of the "commissioners of public works" states that "the board of public works viewed the said premises on June 13, 1894." But in the complaint in this case it is alleged that the pretended assessment was arbitrary and fraudulent and void, for the reason that the board of public works did not consider, with reference to the lots, the injury which might result to the owners by reason of said work, but made an arbitrary assessment of benefits, based solely upon the cost of the work in front or abutting upon the lots, respectively, at the uniform rate of $10 a foot, except upon lot 6, block 4, and lot 6, block 8, and for the

further reason that the board of public works did not take into consideration in any manner whatever the injury to, and damage suffered by, the plaintiff in making such excavation and the removal of said material as aforesaid, and the destruction of this plaintiff's easement of access, and for the further reason that the board made no assessment against the east 112½ feet of lot 6 in block 8. The complaint also alleges facts, at length and in detail, showing that the original surface of the earth above the established grade of the part of Hadley street in question varies from almost nothing to nearly thirty feet. If such allegations of the complaint are true, then the action and proceedings of the board of public works and the common council were repugnant to some of the provisions of the charter which declare that,

—"before ordering any work to be done by the owners of lots or lands fronting on the same, said board shall view the premises, and consider the amount proposed to be made chargeable against said several lots or pieces of land, and the benefits which, in their opinion, will actually accrue to the owner of the same in consequence of such improvement, and shall assess against the several lots or pieces of land, or parts of lots or pieces of land, which they may deem benefited by the proposed improvement, the amount of such benefit which those lots or pieces of land will severally, in the opinion of said board, derive from such improvement when completed in the manner contemplated in the estimate of the cost of such work, made as provided by section six of this chapter, taking into consideration in each case any injury which in the opinion of the board, may result to each lot or piece of land from such improvement; and in case the benefits, in their opinion, amount to less than the cost of the improvement, the balance shall be paid out of the ward fund of the ward or wards in which such improvement is made; and said board shall endorse their decision and assessment in every case on the estimate of the cost of such improvement filed in their office." Sec. 7, subch. VII.

These provisions of the charter, with sec. 8, required the board to consider and pass "upon, not only the question of

benefits and injuries resulting from the improvement, but also the question of damages, costs, and charges by way of compensation for the alteration of the grade." *Liebermann v. Milwaukee,* 89 Wis. 336, 61 N. W. 1112; *Saunderson v. Herman,* 95 Wis. 48, 69 N. W. 977. Since the cut, as to some of the lots, was very much deeper than others, the assessment of a uniform rate of $10 a front foot, as alleged, would seem to be arbitrary and unlawful. *Kersten v. Milwaukee,* 106 Wis. 200, 81 N. W. 948, 1103; *Sanderson v. Herman,* 108 Wis. 666, 84 N. W. 890, 85 N. W. 141. The same is true as to the alleged failure to assess a part of the land fronting upon the same street.

By the Court.—The order of the circuit court is affirmed.

IN RE ALDRICH.

April 4—April 22, 1902.

Clerk of circuit court: Petition for removal: Appealable order.

1. An order denying the petition of a private citizen for the removal of the clerk of a circuit court on the ground of malfeasance does not affect any substantial right of the petitioner, and is not appealable under subd. 2, sec. 3069, Stats. 1898.

[2. Whether a proceeding under sec. 973, Stats. 1898, for the removal of the clerk of a circuit court is a proceeding in court, to which the general statute regulating appeals from orders made by the court is applicable, doubted.]

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, and LAWRENCE W. HALSEY, Circuit Judges. *Dismissed.*

For the appellant there were briefs by *Nath. Pereles & Sons,* attorneys, and *G. D. Goff,* of counsel, and oral argument by *Mr. Goff.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *T. W. Spence.*

WINSLOW, J. On the 9th day of May, 1901, the appellant, *Aldrich,* a resident of Milwaukee, filed his petition in the circuit court for Milwaukee county, charging malfeasance in office by the respondent, *Ringenoldus,* then and now the duly elected clerk of said court, and praying his removal from such office. The respondent made answer to the petition, denying all of the misconduct alleged, and the matter was heard upon oral testimony by the two circuit judges, Hon. EUGENE S. ELLIOTT (now deceased), and Hon. LAWRENCE W. HALSEY, sitting together. At the close of the testimony the said judges joined in an opinion which partakes of the nature of a finding, by which they concluded that there had been no intentional or obvious dereliction in duty on the part of the respondent, and that, if there had been any erroneous action on his part in the particulars charged, it was the result of honest mistake. Thereupon the two judges entered judgment, which in form is a judgment by the court denying the petition and dismissing the proceedings, and from this judgment the petitioner has appealed.

The proceeding was brought under sec. 973, Stats. 1898, which provides that the judge of the circuit court may either in term time or vacation, by order specifying the cause therefor, remove the clerk of the circuit court of any county within his circuit for certain specified causes, among which is official misconduct. Although the proceeding was conducted below as though it were a proceeding in court, and the judgment was entered as a judgment of the court, it may be very doubtful whether in fact it is a proceeding in court at all. The statute provides that the *judge* of the circuit court may make the removal, and the argument is that the law constitutes the judge a special tribunal to pass upon the question; that no appeal from his decision has been provided by the statute; and that the general statute providing for and regulating appeals from orders made by *the court* (sec. 3069, Stats. 1898), has no application. This question is not without its difficul-

ties, but we have found it unnecessary to decide it. Conceding the order in this case to be an order made by the court, it was an order made in a special proceeding, and can only be appealable under subd. 2 of sec. 3069, *supra,* which allows an appeal from "a final order *affecting a substantial right* made in special proceedings." Under this it is self-evident that the order must affect a substantial right of the party claiming the right to appeal. Were the case here on appeal by the clerk from an order of removal, it might well be argued that the order had affected a substantial right of the clerk, because it had deprived him of a valuable office; but in what respect can it be said that any substantial right of the appellant has been affected by the order refusing to remove the clerk? The order deprives the appellant of nothing. It takes no money from the municipal corporation of which the appellant is a member, nor does it in any way affect corporate property; and, even if it did accomplish either of these last-named results, the appellant is not in position to complain, because he is not shown to be a taxpayer in that corporation. It is true, he had set in motion the investigation, and doubtless he felt great personal interest in it; but he has no more real interest in the result of the investigation than any other citizen of the community has, namely, the general interest which every good citizen feels in the proper transaction of public business by public officers. He was no more aggrieved in the eye of the law by the vindication of the clerk from the charge made than he would have been by his conviction and dismissal had such been the outcome of the inquiry. Neither result would deprive him of a dollar of money or affect any right which can be called substantial.

By the Court.—Appeal dismissed.

LOWRY, Appellant, vs. THE MILWAUKEE NATIONAL BANK OF WISCONSIN, Respondent.

April 5—April 22, 1902.

Promissory notes: Renewal: Payment: Banks and banking.

One who was indebted to a bank both upon a note and upon an overdraft gave, as collateral security for such debt or to secure future advances, another note due in five years, secured by mortgage for an amount less than the overdraft. This note was not at the time carried to his credit in the account. Afterwards he gave another note, which was carried to his credit, reducing the overdraft. As these notes, other than the mortgage note, became due, they were renewed from time to time, the debtor giving new notes, which would be placed to his credit in the account, and giving checks for the amounts of the old notes, which the bank would thereupon stamp "Paid" and surrender to him. He also made deposits and drew checks, and balances were struck in his book from time to time. His account continued to be overdrawn, and as the overdraft increased he gave other notes, which were renewed and carried into the account in the same way. None of the renewal notes was ever accepted as payment of the original debt. *Held*, that the collateral note and mortgage had not been paid.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

On and prior to June 15, 1887, Israel H. Lowry was engaged in the commission business on the Board of Trade of Milwaukee, doing business as I. H. Lowry & Co. In the course of his business he became indebted to the defendant, so that on the date last mentioned he owed the bank on a note of $10,000, and had overdrawn his account to the amount of $22,632.27. The bank was pressing him for payment. On that date he executed, with plaintiff, his wife, and delivered to C. T. Bradley, president of the defendant, and for its benefit, a mortgage upon their homestead in the city of Milwaukee to secure a note of I. H. Lowry & Co. to said Bradley for the sum of $12,000, due in five years with seven per cent.

interest, payable semi-annually. The note and mortgage were assigned to the bank on July 9, 1888. No money was paid to the mortgagors. The note and mortgage seems to have been given, as the court found, as security for the indebtedness of I. H. Lowry & Co. to the bank. Lowry continued doing business with the bank until the year 1894, and his indebtedness increased from year to year until at that date, upon a settlement, it was found that he owed the bank $128,594.94. In May, 1894, the bank threatened foreclosure of the mortgage. On May 14th Lowry and plaintiff executed a deed of the mortgaged premises to their son-in-law, W. W. Wight, and on June 26th the latter executed a deed of the same to the bank. At the same time the plaintiff executed and delivered to the bank a note for $12,000, due in three years, and the bank gave her a contract to convey the premises to her upon payment of said sum and compliance with the conditions of the contract. On May 1, 1897, plaintiff took a lease of the premises for a year, with an option to purchase the premises at the sum of $12,000 during said term.

In May, 1898, the plaintiff commenced this action, setting out the transactions before mentioned with reference to the property in question, and claiming that the mortgage first mentioned had been fully paid before she executed the deed to Wight, and that she had no knowledge of the fact until the year 1898. She asked to have the deed to Wight and his deed to the bank set aside, and that the mortgage be declared paid, and that she be allowed to hold the property clear of any claim of defendant. The bank answered, denying payment of the mortgage and alleging a settlement with Lowry.

The case was referred to a referee, who made findings to the effect that the mortgage had been fully paid. On motion of defendant the referee's findings and conclusions were set aside. The matter was then taken up by the court, and new findings were made. These findings cover the formal facts before stated, and, in addition, the facts and circumstances

relative to the manner in which Lowry and the bank conducted their business, and upon which plaintiff relies as showing a payment of the mortgage. Finding 7 was as follows:

"Seventh. The mode of doing business between the said Israel H. Lowry and the said defendant bank consisted of the said I. H. Lowry & Co. depositing in said defendant's bank moneys, checks, and drafts which were credited in his account, and of his drawing checks against his said account in said bank, and being charged for such checks when paid in said account on the books of said bank, and periodically in his bank book; and when the said note which was outstanding on June 15, 1887, became due, and at the time all other notes thereafter given by said I. H. Lowry & Co., representing his indebtedness to the bank, became due, the same were renewed by said bank, and the renewal notes were again renewed, down to the time of the closing of his said account. The mode of doing business and the methods of renewing such notes were substantially as follows: The said Lowry would arrange for the renewal of the notes when they severally matured, and would thereupon give a new note for the amount of the old one maturing at such date, which new note would be placed to the credit of his account, and he would thereupon give a check for the amount of the old note, or in some instances a check for the interest only on such old note, which check would be charged to his account, and the old note would thereupon be stamped 'Paid' by the bank and surrendered to him. By this transaction the indebtedness of I. H. Lowry & Co. to said bank remained the same, but the form of the security was changed by the surrender of the old note and the receipt of the new note given as renewal thereof."

The court further found that the indebtedness of Lowry, existing at the time the mortgage was given, was not paid, and that when old notes were surrendered and new ones taken there was no agreement that such new or renewal notes should be accepted in satisfaction of the debt evidenced thereby, but that such debt remained the same as before. He also found that the deposits in the account of I. H. Lowry & Co. from day to day were applied by the defendant, with the consent of Lowry, to the payment of checks and drafts on said account

from day to day. Findings were also made to the effect that no misrepresentations were made to plaintiff by the bank officials, and that a settlement and compromise was made between plaintiff and defendant on May 14, 1894, wherein defendant agreed to surrender and cancel, and did surrender and cancel, the notes and obligations it had against I. H. Lowry, upon the execution of the deed of the premises mentioned. The court's conclusion was that the mortgage had not been paid, and that judgment should go for defendant.

This appeal is from the judgment entered as directed.

For the appellant there were briefs by *Timlin, Glicksman & Conway,* and oral argument by *W. H. Timlin.*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. H. Noyes.*

BARDEEN, J. Plaintiff's contention that the mortgage upon her homestead had been paid is based largely upon the manner in which the defendant and her husband conducted their business. The potential facts necessary to be considered may be stated as follows:

At the date the mortgage was given, Lowry owed the bank $10,000 on a note due July 25th thereafter. He had also overdrawn his account to the amount of $22,632.27. The account remained the same until June 24th, except that from day to day Lowry made deposits and drew checks thereon, so that the ultimate balance on that day was about $100 less than it was on the day the mortgage was given. On June 24th, Lowry gave the bank a note for $15,000, which was carried to his credit and reduced his overdraft. Thereafter, and until July 25th following, Lowry made deposits almost daily and drew checks on his account, and the difference between the amounts deposited and the checks drawn was deducted from or added to the balance of his overdraft. On July 25th the $10,000 note in existence at the time the mortgage was given became due. Lowry then gave a new note for $10,355.83,

which included interest for six months. He also drew his check for the amount of the old note, and both the checks and the new note were carried into his account. As these notes became due thereafter, the same transaction occurred, except that in one or two instances, instead of giving his new note for the principal and interest, he would give a note for the principal and his check for the amount of the interest. This plan continued from year to year until 1893. In the meantime Lowry continued making deposits and giving checks, and from time to time his bank book would be written up and balanced and his vouchers returned. Other notes were given as his overdraft increased, and were taken up, renewed, and carried into his account in about the same way.

The theory of plaintiff is that, as deposits were made from time to time by Lowry, the same should be applied on the oldest items of the account, and thus the overdraft existing at the time the mortgage was given would be completely wiped out and paid within a few months thereafter. The $10,000 note would also become fully paid in the same way after it had been carried into the account.

We have followed with considerable interest the elaborate argument of plaintiff's counsel, and have consulted the various authorities cited to support his contention. His whole argument is based upon the assumption that the transactions mentioned, and the system of bookkeeping used, indicate that the debt existing at the time the mortgage was given has been discharged, and that as the mortgage was given to secure a present indebtedness, which is no more, the mortgage must be deemed as paid. As we view the situation, it becomes unnecessary to decide whether the mortgage was given as collateral to the debt then due to the bank from Lowry, or as security for future advances. The plaintiff must remember that she is in a court of equity seeking equitable relief; that equity goes beneath the surface of things, and grasps at and avails itself of the substantial facts disclosed. In line with

that principle it becomes our duty to look at and consider the substance of the transactions mentioned, rather than their mere form; to put ourselves, as near as may be, in the attitude of the parties to them, and ascertain the purpose and intention of their various acts.

The evidence is not in dispute. It offers some circumstances explanatory of the transactions, and gives some aid in interpreting the situation. We have then a creditor and a debtor. One part of the debt is evidenced by a note, and the other by an open account. At a later date the debtor transforms a portion of the account into a note. These notes become due from time to time. The debtor has no money to pay them. His bank account still remains overdrawn. He makes a new note including interest for the time of the extended credit. He gives a check on his overdrawn account to cover the amount of the note. Thus his term of credit is extended year after year. From the circumstance that these notes were carried into the debtor's general account, and balances were struck in his book from time to time, the plaintiff insists that the original indebtedness has been paid. There are certainly some cases cited supporting this view. But this court stands committed to a somewhat different rule. In the first place, the acceptance by the bank of a note from Lowry in place of the old one was not a payment of the old one unless expressly so agreed. The long line of cases cited in *Willow River L. Co. v. Luger F. Co.* 102 Wis. 636, 78 N. W. 762, settle that as a proposition of law prevailing in this state. The fact that, when a new note was given, the old one was delivered to Lowry, stamped "Paid," was explained as being in accordance with the practice of the bank. It was not intended as a payment and discharge of the debt. As the bank officials say, it was intended merely as a renewal of the old note. This purpose seems so much in harmony with good business management, and is so evident from all the circumstances in the case, that it cannot be overcome except by evidence clearly indicat-

ing a contrary intent. This evidence was not produced. Certainly, the mere circumstances of carrying the new note into the overdrawn account, and the giving of a check by Lowry for the amount of the old one, are not sufficient. The balancing of the account and the surrender of the old note and vouchers was a proceeding according to the custom of the bank. Looking at the entire transaction, and dealing with the *substance* of the affair, it amounts to nothing more than a "gift of time" to Lowry. There was no testimony of any understanding or agreement whatever that any of the several notes should be received, or were received, except as renewal notes. The evidence seems conclusive that the bank never accepted any one of the renewed notes in payment or satisfaction of the original debt. It was never in fact paid, but was carried along from time to time until about the time of the final settlement.

The case of *First Nat. Bank v. Case,* 63 Wis. 504, 22 N. W. 833, is closely parallel in all its facts. The case and briefs show that the practice of the bank was very similar to the case at bar. In the discussion of the case, Chief Justice COLE says:

"Of course, the *onus* was upon the defendant to show by direct and positive proof that the plaintiff had agreed to receive some one of the renewed notes as a payment and discharge of the original loan. The surrender of the old note upon a new one being given does not raise any presumption of the extinguishment of the debt, but an agreement must be shown that it should have that effect. The defense of payment is attempted to be established here by facts and circumstances not conclusive in their probative force, even when not met by countervailing evidence. But in the light of other explanatory testimony they have but little effect to prove the defense. They certainly fall far short of proving an agreement or understanding on the part of the bank that any renewed note should pay the debt."

Applying this language to the facts in this case leaves nothing more to be said. It touches it upon all its four corners.

The original debt not having been discharged, the mortgage was a binding obligation. We approve the findings of the trial court, and must sustain the judgment.

By the Court.—The judgment is affirmed.

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114 318
115 598

GOODWIN, Plaintiff in error, vs. THE STATE, Defendant in error.

April 7—April 22, 1902.

Assault by husband upon wife: Wife may swear to complaint: Evidence: Credibility of witnesses: Medical examination: Leading questions: Curing error: Admissions: Instructions to jury.

1. The complaint against a husband for an assault upon his wife may be sworn to by her.
2. After a witness has completed her testimony and left the stand, the court has no power to require her to submit to a medical examination to determine whether she is afflicted with hysteria, as a basis for evidence bearing upon her credibility, accuracy of memory, etc.
3. The exclusion, as leading, of questions limiting the subjects of conversations called for, and the further exclusion, as too general, of questions not so limited, is *held* error.
4. After such confusing rulings, counsel was entitled, upon request, to have the court suggest what questions might be asked.
5. The fact of a woman's illegitimate pregnancy, or of her making a complaint for bastardy, is not admissible as bearing on her credibility as a witness.
6. After questions as to such facts had been permitted on cross-examination, and the witness had answered them, a mere remark of counsel that the questions were withdrawn did not cure the error.
7. Defendant was accused of throwing his wife into a well about fifteen rods distant from his house, and sought to show that he was in the house at the time in question. There was evidence that all the family except defendant had gone to bed, and tending to show that all other persons who had been in the saloon in the lower part of the house had left. A servant testified that from her room she had heard defendant bring an in-

toxicated man upstairs and put him to bed, recognizing defendant by his voice. *Held*, that her further testimony as to the sounds she heard of his steps in passing downstairs, the clinking of glasses, the winding of the clock, and finally the arrival of the persons who had heard the outcry of the wife in the well, should not have been excluded on the ground that it was not certain that there was no one other than defendant in the rooms below, but that question should have been left to the jury.

8. After the wife had been rescued from the well her brother, in effect, charged defendant with putting her there, and he replied in substance that she could not prove it, or that he would give her brother a chance to prove it. *Held*, that this was not an admission of guilt or of any fact, and that a charge to the jury conveying to them the impression that it might be so construed was erroneous.

ERROR to review a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

Plaintiff in error was charged with assault with intent to kill his wife, Mary Goodwin, on May 29, 1900. The evidence for the prosecution was to the effect that some time between 10 and 11 o'clock of that evening, after the customers at his saloon had all gone and the family had all retired to bed, defendant induced his wife to arise and go with him, ostensibly to hold a lantern while he treated a sick horse; that he thereupon took her some fifteen rods to a seldom-used shed or stable, and cast her into a well, from which she was rescued by reason of her cries being heard by people passing in the street. The defense rested upon evidence tending to show the whereabouts of the defendant at all periods between 10 and 11 o'clock, and up to the time when the alarm was brought to him, and he confessedly went with others to the rescue of his wife; the theory of the defense being that the wife, being, if not insane, in a highly disturbed and hysteric mental condition, had either wandered to the region of this well and fallen in, or had attempted suicide. When the wife was raised from the well, and while being supported by her brother on one side and her husband on the other, her brother inquired how

she got there, and she replied that her husband had put her in. Thereupon the brother said to defendant that it looked pretty serious, implying a charge of guilt against him, and he replied, with an oath, either, "She can't prove it," or, "I will give you a chance to prove it."

A plea in abatement was interposed, based upon the contention that there had been no legal preliminary examination, because the complaint before the justice of the peace was sworn to by Mary Goodwin while still the wife of the accused. Much evidence was offered of the wife's disturbed mental or nervous condition and of strained and unpleasant relations between them. The plea in abatement was overruled and exception taken, and upon the trial a verdict of "Guilty" was found, and, after motions to set aside the same and for a new trial, judgment and sentence were pronounced, to which plaintiff in error sued out the present writ.

M. E. Burke, attorney, and *H. W. Chynoweth,* of counsel, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *M. L. Lueck,* district attorney, and oral argument by *R. F. Hamilton,* second assistant attorney general.

DODGE, J. 1. An error assigned upon overruling the plea in abatement, for that the defendant's preliminary examination was had upon the complaint sworn to by his wife, cannot be sustained. From early times the law has recognized the necessity of accepting the wife's testimony to prove personal assaults upon her by the husband, as an exception to the general rule excluding the wife from testifying for or against her husband. *Mills v. U. S.* 1 Pin. 73, 74; *Stein v. Bowman,* 13 Pet. 209, 221; *People v. Northrup,* 50 Barb. 147, 156; *Comm. v. Sapp,* 90 Ky. 580, 14 S. W. 834.

2. Error is assigned because, after the complaining witness had testified, her cross-examination had been completed, and

she had left the stand, on the following day the defendant asked the court, in the exercise of its discretion, to require the complaining witness to submit to an examination to determine whether or not she is afflicted with hysteria. This the court refused, saying that he was satisfied of the competency of the witness, both by previous observation and by her manner of testifying. Counsel responded that they desired it as a basis for evidence bearing upon her credibility, accuracy of memory, etc. In this ruling we discover no error. Counsel cites us no case, and we confidently believe there is no authority, to support the power of a court, after a witness has completed her testimony and left the stand, to compel her to submit to a medical examination, physical or mental. It would be such an invasion of the rights of personal liberty that arguments far more cogent than any suggested would be necessary to convince us of the existence of such power. Counsel refers to cases where the power of the court to compel examination of parties, more especially in personal injury cases, has been declared. That, of course, stands on an entirely different ground. There the party is seeking a remedy from the court, and, if there is any reason to believe that the facts would be better disclosed by an examination, the court has power, in its discretion, not so much to compel the examination, but to make it a condition of further entertaining the prayer for relief. Nor should we doubt that in a proper case, where the court was seriously doubtful of the mental competency of a proposed witness, he might impose a medical examination as a condition of allowing the witness to testify, to which she might refuse to submit. But the step requested in this case demanded such control as the court could not exercise over a person not a party to the proceeding, and was properly denied.

3. Error is assigned upon the rulings and remarks of the court with reference to examination of a witness, Tillie Sonnenberg, who was formerly a domestic servant in the family

of the plaintiff in error. The following is a condensation of what transpired, as appears by the record:

"*Q.* Did you ever hear Mrs. Mary Goodwin make any threats? (Objected to as leading.) *By the court:* What, if anything, did you hear Mrs. Goodwin say to *Mr. Goodwin?* *Q.* Did you ever see her with a butcher knife in her hand? (Objected to.) *By the court:* It is most certainly directing her attention directly. *Q.* What, if anything further, did you see Mrs. Goodwin do, or hear, while you were there? *By the court:* Limit it. I can't have the general conversation. (Exception.) *Q.* Anything in the line of threats or otherwise? *By the court:* I won't permit any further suggestion in the line of the answers you want."

After some further questions were held leading, counsel for defendant said: "I would like to have the court suggest—*By the court:* We are not running a kindergarten." Clearly the court was too restrictive. It was apparent that the testimony was preliminary to the relation of threats and of conduct involving the use of a butcher knife, and the mere inquiry whether there were any such occasions was in no wise prejudicial; but, further than this, when the counsel, in deference to the court's rulings, attempted to make his question general, he was promptly restrained from that course. We confess to the same difficulty in understanding the court's position which seems to have burdened defendant's counsel. If he could neither call for a general conversation without limiting it, nor could put a question which had merely the effect of limiting the subjects of the conversation called for, he was indeed in bad case. The defendant was entitled to bring out the facts. If the court deemed it perilous, by reason of the attitude of the witness, to allow any leading, then of course he might restrain the counsel; but in that event he should not have prevented him from putting general questions containing no suggestion of the subject upon which he wished the witness to testify. When counsel, after these confusing rulings, asked for suggestion from the court, we think he was

fairly entitled to it. *Colburn v. C., St. P., M. & O. R. Co.* 109 Wis. 377, 383, 85 N. W. 354. Whether there was error in denying that request by the remark, "We are not running a kindergarten," perhaps need not be decided. The manner of response from court to counsel and the measure of dignity which should characterize it is largely a matter of taste, about which disputation is not profitable.

In the cross-examination of the same witness, she having testified that she had made a complaint against a young man for bastardy, she was asked: "How long before you left *Goodwin's* did you make that complaint?" and again, "Did you have a child after you went away?" These were objected to, the objection overruled, and the evidence admitted only as to credibility of the witness. No authority is cited to us that the fact of a woman's illegitimate pregnancy or of her making complaint for bastardy is admissible as bearing upon her credibility. It is not authorized by sec. 4073, Stats. 1898. The admission of such questions and such inquiry, tending, as it must, to defame the witness before the jury, is error and highly prejudicial. *Muetze v. Tuteur,* 77 Wis. 236, 243, 46 N. W. 123; *Buel v. State,* 104 Wis. 132, 145, 80 N. W. 78; *Kolb v. Union R. Co.* (R. I.) 49 Atl. 392, 54 L. R. A. 646; Rapalje, Witnesses, §§ 197, 201; Thompson, Trials, §§ 525, 535. The error was not cured by the fact that after the ruling and admission of the evidence, and on a suggestion of doubt by the court as to the course of the cross-examination, counsel for the state withdrew the question. The evidence was already in, and had had its effect upon the minds of the jury, and there was no instruction by the court to disregard it. Specific and prejudicial error having been committed, something more than the remark of counsel that the question was withdrawn was necessary after it had been ruled on and answered.

Complaint is also made of the rulings of the court with reference to the testimony of a very important witness, Millie Sonnenberg, who was a domestic servant at the time of the

alleged offense, and by whom was sought to be proved the fact that the defendant did not go away from his residence at a time to render the commission of the offense possible. There was evidence that the family, including this witness, had all retired to bed, and that all other persons who had been in the lower part of the house had left. The defendant had brought upstairs and put to bed an intoxicated man, and, it was claimed, then returned down to his saloon and proceeded with the shutting-up work about the several rooms. This witness heard him put the man to bed, knew it was defendant by hearing his voice, and then proceeded to testify with reference to the sounds she heard of his steps in passing downstairs, the opening and closing of doors, the clinking of glasses, the winding of the clock, and finally the arrival of the persons who had heard the outcry of the complaining witness in the well. The court first refused to allow the witness to testify in response to questions assuming that the defendant was the person whose steps and other conduct she heard, and then refused to allow her to testify in response to questions as to what sounds she heard without making such assumption, on the ground, apparently, that it was not rendered certain that there was no one other than the defendant in the rooms below. In this respect we think the rulings were far too restrictive. Whether the absence of any other person had been shown conclusively or not, there was evidence tending to establish that fact, and the very nature of the sounds which this witness heard were of a character to justify an inference by the jury that they were made by the defendant. That question should have been left to them, and not decided by the court as a reason for excluding the evidence.

4. Error is assigned upon an extended instruction to the jury upon the subject of admissions, which the court prefaced with the remark, "There has been some evidence given in the case that is claimed to show an admission on the part of the defendant, which it is claimed has a bearing on the issues of

this case." He proceeded: "A voluntary admission or statement of a person accused of crime, in reference to the commission of the crime, or in reference to his motive for the commission of the crime of which he is accused, if you find that any such crime was committed by him, or as to his motive, is received in evidence upon the presumption that a person will not make an untrue statement against his own interest." This was followed by statements of the rule of law as to the feebleness of such evidence, and the necessary precaution by reason of uncertainty as to understanding or memory of witnesses; in one instance, at least, referring to the matter as a "confession," and stating the rule that such confession must be without inducement or menace. The only possible justification for any charge on this subject was the answer of the defendant, made after his wife was rescued from the well, and her brother substantially charged him with putting her there, to the effect that "she can't prove it," or, as defendant himself stated it, "By God, I will give you a chance to prove it." I presume we may take it for granted that this evidence was made the basis of an argument by the prosecution that such answer was not a denial of defendant's guilt, and not such a repudiation of the charge as an innocent man would have made, and very likely, in the course of the argument, such conduct was claimed to constitute an admission of guilt. But of course there was no admission, either of guilt or of any fact; certainly no more so than would have been absolute silence on the part of the defendant. It may well be that from such silence, or from the fact that the response made did not categorically deny guilt, an argument against innocence might have been made; but this does not constitute an admission either out of silence or out of the denial of something else. The words themselves of course admitted nothing. They were denial in form. If any inference was to be drawn, it was from the failure to say something else, not from saying those words. This being so, we cannot regard this instruction other-

wise than as misleading and as extremely likely to convey to the jury, with all the sanction accompanying the court's charge, the idea that they might consider the defendant to have admitted either his guilt or a fact from which guilt might be inferred. The defendant was entitled to the decision of the jury unbiased by anything of that sort.

The circumstances of the case are very peculiar. Either theory involved much of improbability and uncertainty. It was, of course, highly improbable that a man apparently of ordinary characteristics, in the interval of a few minutes in his daily affairs, should decoy his wife to an almost unused building, and plunge her into a well. It was also extremely improbable that the complaining witness should have got into that well, except by the wrongful act of some one, unless her mental or nervous condition might account for it on the theory of confusion or suicide. The balancing of these doubtful probabilities was essentially for the jury, and, while it might not have been improper for them to consider the conduct of the defendant in answering the charge against him when first made, it was not proper for the court to convey to them the idea that any words which the testimony tended to show he had used were capable of a construction either into a confession of guilt or admission of any fact tending to that conclusion. We are unable to construe the charge otherwise than to this effect. If the court did not consider that there was evidence tending to prove either an admission or a confession, a considerable part of that charge was wholly without application to the case and futile. Could or would the jury imagine that the court was indulging in mere academics? Ought they not to believe that every word uttered to them in so important a situation was carefully considered and material to the duty they had to perform? We think they ought to, and ordinarily would, so believe, and that it is impossible to avoid the conclusion that the impression so conveyed to the jury must have been prejudicial to the accused, and may have been the decid-

ing straw which led them to resolve the conflicting improbabilities against him. We are convinced that the giving of this portion of the charge was prejudicial error. *Allen v. Chippewa Falls,* 52 Wis. 430, 433, 9 N. W. 284; *Thayer v. Davis,* 75 Wis. 205, 211, 43 N. W. 902; *Thomas v. Paul,* 87 Wis. 607, 611, 58 N. W. 1031; *State v. Parish,* 78 N. C. 492; *Covington v. State,* 79 Ga. 687, 7 S. E. 153; *Fletcher v. State,* 90 Ga. 468, 17 S. E. 100; 11 Am. & Eng. Ency. of Pl. & Pr. 170 *et seq.*

Since there must be reversal for the errors above specified, and since the other assignments of error are predicated upon details of the trial not likely to present themselves again in the same form, we forego their discussion and decision.

By the Court.—Judgment reversed, and cause remanded for a new trial.

KAUKAUNA ELECTRIC LIGHT COMPANY, Appellant, vs. CITY OF KAUKAUNA, Respondent.

February 1—May 13, 1902.

Municipal corporations: Ordinance granting franchise: Contract for street lighting: Recovery of compensation: Defenses: Breach of duties pertaining only to franchise: Rescission: Specific performance: Counterclaim: Judgment.

1. Where a municipal ordinance grants to an electric light company a franchise to use the streets upon certain conditions and also contains a contract with the company for street lighting, breaches of the conditions which are germane only to the franchise—such as those which relate to the burying of wires or the painting of poles—constitute no defense to an action to enforce payment for lights furnished under the contract.
2. A provision in such an ordinance that the company shall give and, whenever requested, renew a bond to indemnify and save harmless the city from all damages arising out of the exercise of the privileges granted, and for faithful compliance with all the provisions of the ordinance, is germane both to the fran-

chise and to the contract; but where the city has demanded a new bond merely to indemnify it for "all loss or damage by reason of the privileges granted them under the franchise," failure to comply with such demand does not put the company in default with respect to the contract or constitute a defense to an action thereon for lights furnished.

3. An agreement, contained in such ordinance, that the company will furnish to the city, for street lighting, electric lights of specified power at a certain price per light, is an agreement to furnish all such lights as the city may, in reason, deem necessary and demand.

4. Such agreement is an essential consideration or condition upon which the city's promise to pay for street lighting is based, and the injury to the city from a breach thereof cannot be measured in damages. Performance by the company is, therefore, a condition precedent to its right to recover for lights actually furnished, unless the city has so acted as to justify an assumption of acceptance, consent, or waiver.

5. Where, after demanding that additional lights be furnished under such agreement, the city waited a reasonable time (some three months) until the company's purpose not to furnish them became clear, paid for lights actually furnished meanwhile, then notified the company that it would no longer accept or pay for lights furnished by it, and thereafter did not accept or voluntarily receive further service from the company, the latter was not entitled to recover for street lights which continued to burn without any power on the part of the city to prevent it.

[6. Whether for such a breach of the lighting contract the city might, by declaration and notice of rescission, effectually terminate the contract, not determined.]

7. Where by reason of nonperformance of the lighting contract the company is not entitled to recover for lights furnished, it cannot complain of a judgment allowing it to recover the sum sued for, without interest and without costs, upon condition that it comply with provisions of the ordinance relative to burying its wires and giving a new bond.

8. But the city could not, in the action on the contract to recover for lights furnished, interpose a counterclaim for specific performance of provisions of the ordinance which are germane only to the franchise granted; and a judgment in such action, so far as it contains a mandatory decree requiring the company to comply with such provisions, is erroneous. [Whether the city could obtain such relief in an independent suit, not determined.]

9. In such an action to recover for lights furnished, the city offered, if the court concluded that the contract had not been effectively

terminated by declaration and notice of rescission, to continue it upon condition that all refusals to abide its terms be abandoned by the company, and also to pay such sum as it ought for lights which had been furnished. Plaintiff was not legally entitled to any recovery, but the judgment allowed it to recover the amount sued for, without interest and without costs, upon condition that within four months it comply with certain provisions of the ordinance in respect to burying its wires and giving bond of indemnity. The judgment also, erroneously, on defendant's counterclaim, granted a mandatory decree for such compliance. Defendant did not appeal. *Held*, that as to the money recovery the judgment should be sustained, and plaintiff be given four months after entry of a corrected judgment to perform the conditions imposed.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Plaintiff operates an electric light plant at the city of *Kaukauna,* occupying the streets with its poles, under a franchise in the form of an ordinance of the city adopted September 5, 1889, which gives it a right to use the streets for the purpose of furnishing both arc and incandescent lights. By the second section the company contracts to furnish the city incandescent electric lights of certain sizes at certain prices; also to furnish certain lights for bridges, fire department, and council room free of charge. Other sections of the ordinance provide that the company shall give a $5,000 bond, conditioned "to indemnify and save harmless the city of *Kaukauna* of and from all damages which may in any way arise or grow out of the exercise by said grantee of the privileges herein granted," and further conditioned "for the faithful compliance by said grantee with all of the terms and provisions of the ordinance, and said bond shall be renewed at any time and as often as the common council of said city may require." It was also provided that after ten years from the passage of the ordinance, "if the city deems it necessary, the said grantee shall be required to lay its wires under ground, including those already put up, at the rate of not

less than two or more than four blocks per year until all wires are under ground." The acceptance of the ordinance was declared to constitute a contract binding with equal force upon both parties thereto. This ordinance was duly accepted and a bond filed.

On August 4, 1897, a supplemental contract was made, by which the company agreed to furnish, at a price specified, such arc lights as the city might demand, except that they should not be located more than 600 feet from existing lamps; such arc lamps to displace such incandescent lamps as the city should direct. Otherwise the former contract remained in full force with the later contract as a supplement.

On March 7, 1899, the city enacted an ordinance requiring certain painting of all poles in the city, expressly including those of this plaintiff, imposing a penalty or fine of $5 for every twenty-four hours of disobedience after thirty days' notice. That notice was given about August 1, 1899. On July 11, 1899, a resolution was adopted, and communicated to the plaintiff, requiring additional incandescent lamps to be located at five or six specified places. On August 1, 1899, a resolution was adopted, and communicated to the plaintiff, requiring the company to give a new bond, in the sum of five thousand dollars, "to indemnify the city from all loss or damage by reason of the privileges granted them under their franchise." On the same day a resolution was adopted to notify the company that the city would exercise its right under the franchise to require the company to bury four blocks (not designated) of their wires after the ten years should have expired, viz., September 5, 1899. On October 3, 1899, an ordinance was duly adopted, and notified to the plaintiff, reciting the provision of the franchise, and declaring the sense of the council that the burying of a portion of plaintiff's wires was necessary for the best interests and welfare of the city, and ordering the plaintiff to place under ground their wires on two specified blocks, and to commence

such work within thirty days after the passage of the resolution, and to prosecute it with due diligence until its completion.

The company made no attempt at compliance with any of the ordinances and resolutions of 1899 above recited, and on November 7th the council adopted a resolution reciting the failure to comply with said several ordinances and resolutions, and resolving that the city thereby declared said franchise and contract forfeited and broken; that it would no longer accept or pay for lights furnished by the company; and that the company be, and it thereby was, ordered to remove from the public streets all poles, wires, and other fixtures. The same day was appropriated $100 as payment in full to the company of all that was due it for light up to the date of that resolution, which money was tendered to it, and was brought into court and deposited at the time of answering. Plaintiff continued to run the pre-existing street lamps, but the city cut off all lamps within its control in the public buildings and on bridges, and neither received nor used any light or power from the plaintiff, after November 7th, voluntarily. Thereafter, at monthly intervals, the company presented its bills, which were not passed upon by the council, and within the time limited by the charter the company took appeals to the circuit court, until a large number of such appeals were pending, upon bills of about $260 a month, which were afterwards consolidated into this one suit, making a total of $4,222.08.

The defendant interposed as answer a denial of compliance by the company with its contract, alleging all of the breaches of ordinances and resolutions above recited. It counterclaimed the same breaches to its damage $5,000, and by a second counterclaim it set up the same breaches of duty; also that the city had no other means of lighting its streets, and could not practically supply another method; that the plaintiff was engaged in commercial lighting as well as street

lighting, and used its poles and wires for that purpose, whereby the city was continually subject to liability, for which it had no adequate indemnity in the form of a bond or otherwise; that the damage to the city from such breaches of contract by the plaintiff was great and irreparable, but difficult, if not impossible, of ascertainment; that a multiplicity of suits arose from the continued claim of the plaintiff to continue furnishing lights under the ordinance, alleging that, if the whole contract had not been effectively rescinded, the city was ready to comply on its part with all of its contract, provided the plaintiff should first perform the conditions of its franchise and contract; and prayed judgment dismissing the complaint, enjoining the commencement of any more suits or filing of any more claims before the council; also that the plaintiff be perpetually restrained from committing any breach of either of its two contracts; that it be compelled to place and maintain the additional lights demanded, and such others as might be demanded, by the defendant; and that by mandatory injunction it be compelled to bury its wires, as specified in the recited resolutions, and be compelled to furnish the defendant a bond in compliance with its contract; also that the same acts be enforced by decree of specific performance.

The court found the facts substantially as above, and on October 30, 1901, rendered judgment that the two contracts of September 5, 1889, and August 4, 1897, be specifically enforced, by requiring the plaintiff, within four months from the service of notice of entry of the judgment, to deposit with the city clerk a bond in the penal sum of $5,000, conditioned as required by the contract; that within like four months, adjudged to be a reasonable time, the plaintiff lay or place under ground its wires in the blocks specified in the ordinance; and that, upon affidavit filed with the clerk of court showing compliance therewith, judgment be entered in favor of the plaintiff and against the city for the contract

amount of the service sued for, $4,222.08; and further providing that, in case of failure to comply within four months with the mandatory portion of such judgment, the plaintiff take nothing by the action and its complaint be dismissed; judgment without costs to either party. From that judgment the plaintiff appeals.

Humphrey Pierce, attorney, and *D. S. Rose* of counsel, for the appellant.

For the respondent there were briefs by *Lyman E. Barnes, G. H. Dawson, Joseph Chopin,* and *E. A. Baker,* and oral argument by *Mr. Barnes.* As to the power of the court to decree specific performance of the lighting contract, whether it be considered as parcel of the franchise proper or as a distinct and independent contract, they cited *Burlington v. Burlington W. Co.* 86 Iowa, 266, 276, 279, 53 N. W. 246; *Joy v. St. Louis,* 138 U. S. 1, 42, 46, 47, 50; *Pennsylvania R. Co. v. St. L., A. & T. H. R. Co.* 118 U. S. 290, 305, 306; *Franklin T. Co. v. Harrison,* 145 U. S. 459, 474; Pom. Eq. Jur. sec. 11; *Union P. R. Co. v. C., R. I. & P. R. Co.* 163 U. S. 564, 600, 601; *Bald Eagle V. R. Co. v. Nittany V. R. Co.* 171 Pa. St. 284; *Conemaugh G. Co. v. Jackson F. G. Co.* 186 Pa. St. 443; *Standard Fashion Co. v. Siegel Cooper Co.* 157 N. Y. 60; *Prospect Park & C. I. R. Co. v. Coney I. & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610; *Schmidt v. Louisville & N. R. Co.* (Ky.) 38 L. R. A. 809; Pom. Eq. Jur. (2d ed.) secs. 1402, 1404.

The following opinion was filed March 11, 1902:

Dodge, J. The ordinance or contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this state, where the city acts in a twofold capacity. First, as a governmental body exercising delegated power of the state, it confers, and limits with conditions, the privilege or franchise to use the public streets, under authority of sec. 1780*b*, Stats. 1898. *State ex*

rel. Rose v. Superior Court, 105 Wis. 651, 673, 81 N. W. 1046; *State ex rel. Att'y Gen. v. Portage City Water Co.* 107 Wis. 441, 445, 83 N. W. 697. It is true that no such authority had been delegated when, in 1889, this ordinance was enacted, and it was perhaps originally void. This want of authority with reference to electric lighting companies was, however, supplied by ch. 192, Laws of 1893, which probably may be considered as ratifying the original ordinance. In addition to this function as an agent of the state, however, the city, in the same instrument or ordinance, exercises its function as a business corporation, with power to purchase, contract for, and pay for electric lights for public purposes, and to specify the conditions of such contracting,—a power arising under its own charter. In the argument in this case, as in the ordinance itself, these two functions are greatly confused, and it is not always easy to separate those provisions which pertain to the one portion or the other of the instrument. In the formulation of such a document, reciprocal duties are usually imposed both upon the grantee of the franchise and upon the city. Some of these duties or conditions clearly relate exclusively to the subject of the franchise. Others with equal clearness may apply only to the contractual and commercial duty of supplying lights to the city, to be paid for when so supplied. Other provisions, conditions, and covenants may be of a mixed character, possibly applicable to both phases, so that their disobedience would at once constitute a breach of the plaintiff's contractual duty, which forms the basis of the city's promise to pay, and also a breach of the conditions upon which it holds its franchise from the state to occupy the public streets.

The plaintiff's action is predicated wholly upon the commercial contract embodied in the original ordinance and in the supplemental contract with reference to arc lights. The city's defense thereto is breach by the plaintiff of several

of the obligations which it assumed. In dealing with this street-lighting contract, the parties stand purely and simply as contractors, governed by the same rules of law which govern private contractors, except so far as the known situation of each may control the interpretation of their mutual promises. The company is to do certain things as a consideration of the city's promise to pay, and, as in the case of any other contract, the city's duty to pay arises only on performance of such of the undertakings of the company as can be fairly said to constitute essential consideration therefor. This consideration makes it necessary to examine the various failures of duty on the part of the plaintiff alleged and found to have occurred, in order to ascertain whether any of them were fairly germane to the contractual aspect of the ordinance, and conditions precedent to the duty of the city to perform its part of that contract.

The obligations and conditions assumed by the company, and breached by it, which the answer sets up by way of defense, are four: first, that the company has failed and refused to place underground its wires when ordered so to do by the common council; second, that it has failed and refused to paint its poles in the manner required by a city ordinance; third, that it has failed and refused to give a new bond as demanded by the city; and, fourth, that it has failed and refused to instal incandescent street lamps when and where demanded by the council.

As to the first two of these,—the burying of the wires and the painting of the poles,—we deem it entirely clear that they have no relation to the mere commercial contract of purchase and sale of lights; that they pertain wholly to the gift and continuance of the franchise to use the streets, if, indeed, the painting of poles can be deemed a condition of the original ordinance at all. They do not in any wise affect the interests of the city as a buyer of public lighting. They may affect its municipal government and policy as to the

care and protection of the streets, but in that respect they are relevant only to the propriety of the continuance of the plaintiff's franchise to use the streets. Hence we conclude that their performance or breach is in no wise material to the lighting contract; that, if any penalty results to the plaintiff therefrom, it is a forfeiture of its franchise, which can be enforced only at suit of the state. *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 36, 69 N. W. 791. So long as the state allows that franchise to continue in existence, if the company duly performs its promise to furnish lights in the manner prescribed by the ordinance, it arouses the duty of the city to pay therefor according to its promise.

The agreement of the plaintiff to give and, whenever requested, to renew a bond conditioned to indemnify and save harmless the city from all damages which may in any way arise or grow out of the exercise by said grantee of the privileges granted, and for the faithful compliance by the company with all the terms and provisions of the ordinance, has a more complex aspect. Damages may arise to the city both from the exercise of the franchise and from the manner of performing the lighting contract. The poles may be so placed or so out of repair as to constitute defects in the highway, and subject the city to liability, or impose upon the city otherwise unnecessary expenses in the maintenance of the streets. In this aspect it is germane alone to the franchise granted by the state, through the agency of the city. But damages may also arise from breaches in the performance of the duty to supply street lighting. The city may thereby be put to expense for purchase of lights deemed by it necessary, and otherwise suffer damage of the same character as would arise if there were purely and simply a lighting contract, disassociated from the franchise. Hence, if properly demanded, the refusal of the company to renew its

bond might constitute such a breach on its part of the contract as to justify the city in terminating it,—in deeming itself unsafe to proceed therewith in the absence of this bond which the company had contracted to furnish as one of the considerations upon which it was to earn payment for lights furnished. In this aspect, however, we think, technically, the city has not placed the corporation in default with reference to the renewal of the bond, since it has made no sufficient demand for a new bond to protect itself against these contractual aspects of liability, within the promise of the company to supply one. The sole demand was by ordinance of August 1, 1899, for a bond "to indemnify the city from all loss or damage by reason of the privileges granted them under their franchise." A bond satisfying this demand would have no bearing upon or relation to damages suffered by reason of nonperformance or misperformance of the lighting contract, and we therefore conclude that the failure to comply therewith constitutes no defense to demand for payment. Had the demand been as broad as the ordinance requirement, a different question would be presented.

The remaining undertaking, breach of which is alleged and found to have occurred, is as follows: Plaintiff's assignor "hereby agrees to furnish the city of *Kaukauna,* for street and public lighting, incandescent electric lights, . . . of twenty-five candle power, at a cost," etc. This agreement may also have a complex aspect, as it may well have been one of the considerations and conditions upon which the city deemed proper to grant the plaintiff the right to use the public streets for distribution of its product to its customers. Whether so or not, it very clearly must have been a most important consideration of the city's promise to pay for street lights furnished to it. The duty of effectively and economically lighting its streets is one of the most important which a city has to perform, and one which can be

properly accomplished only by adoption of some system. While it is possible, perhaps, to make an attempt at street lighting by means of an oil lamp at one corner, a gasoline lamp at another, or gas and electric lights in alternation, such method, generally speaking, is neither practical, effective, nor economical. According to modern practice, a city seems to have but a choice between two methods of performing this duty,—either to contract with some private corporation, or to erect and operate a plant of its own. In the case of a small city, a binding acceptance of the former alternative, in practical effect, is exclusive of further consideration of a general policy. If thenceforward the city must buy of that corporation any considerable portion of its lights, it can neither buy others of any one else, nor economically supply them itself; for the whole field of such a city is ordinarily none too large to warrant installation of a plant, either by private capital or by the city, and, after the final surrender of a part of such field to one, supply of light to the remainder by another can only be accomplished at such expense as to make the attempt impracticable. In view of these considerations, it is not open to doubt that the parties understood and intended by their contract that the city must be dependent on the plaintiff for all electric lighting which it, as the custodian and guardian of the public welfare, should deem necessary; hence that the plaintiff bound itself to furnish all so necessary, at least within reasonable requirements. A construction that the company was to furnish only so many lights and at such places as it chose must proceed upon the assumption that the city intended to abrogate its power to perform its public duty,—an assumption not to be adopted except in an entirely clear case. Nor can it be doubted that this agreement by the plaintiff to furnish such lights as the city might, in reason, deem necessary and demand, lay at the very foundation of the promise by the latter to pay the price therefor. If the city must buy of the company those

lights already installed, it cannot practically or economically obtain elsewhere others which it may deem necessary; while, on the other hand, if absolved from duty to purchase any from plaintiff, it is much more feasible for the city either to offer a contract to other parties, or to erect a plant of its own. It is not conceivable that the parties in a contract like this intended or understood merely that the furnishing of each lamp should be the sole consideration of the promise to pay the contract price thereof. That would not accomplish at all its main purpose, namely, to supply the city with a system of electric street lighting to satisfy the needs of the public. To this end, the placing of lamps when and where needed is quite as essential as supplying an electric current to those which are placed, and is quite as surely the consideration of the promise to pay. It is, too, quite incapable of compensation in damages or by deduction; for no one can tell how much the contract price was enhanced in consideration of the duty to instal lights where demanded, and the injury to the city cannot be measured by money.

Thus the plaintiff stands before the court convicted of failure to perform the service which the parties agreed should arouse the duty of defendant to make the payments sought to be enforced. Generally speaking, no rule of law is more elementary or better settled than that one cannot recover the contract price when he has not performed the precedent contract consideration material to the contract purpose, and not measurable in damages. *Ellen v. Topp,* 20 Law J. Exch. 241; *Graves v. Legg,* 23 Law J. Exch. 228; *Robinson v. Brooks* (C. C.) 40 Fed. 525; *Davis v. Hubbard,* 41 Wis. 408; *John Pritzlaff H. Co. v. Berghoefer,* 103 Wis. 359, 364, 79 N. W. 564; *Coorsen v. Ziehl,* 103 Wis. 381, 384, 79 N. W. 562. This rule has its modifications, arising out of conduct of the defendant upon which can be predicated an assumption of acceptance, consent, or waiver. When this exists, so that the plaintiff has parted with its property or

service upon the justifiable belief that it is voluntarily received by the defendant as satisfying the contract, the latter will not be permitted to defend on the ground of imperfections or differences which it might have detected and made basis of refusal before receiving the benefit or permitting plaintiff to suffer the loss. *Locke v. Williamson,* 40 Wis. 377; *Monroe Water Works Co. v. Monroe,* 110 Wis. 11, 21, 85 N. W. 685; *Bostwick v. Mut. L. Ins. Co.* 89 N. W. 538.[1] This case is, however, barren of any such circumstances. The city waited a reasonable time (some three months) after demanding the additional lights, until plaintiff's purpose not to furnish them became clear, paid for the lights actually furnished meanwhile, and then notified plaintiff that it would no longer accept or pay for lights furnished by it. It did not accept any further service. True, street lights continued to burn, but not with the city's consent, and without any power on its part to prevent them. Clearly, therefore, the plaintiff has not performed the lighting contract on its part during the period covered by the bills sued on, and the city has not accepted or voluntarily received any of the benefits thereunder, upon which its promise to pay depends; and a complete defense was set up and proved against the plaintiff's cause of action at law, so that it was not entitled to recover, and judgment dismissing the complaint would have been proper.

The defendant in this case further contends that by reason of plaintiff's breach the principal purpose of the lighting contract had been defeated, and the plaintiff had conclusively declared its purpose not to be bound thereby as to one of the essential elements, whereby the city had a right to, and did, treat the contract as abandoned, and finally terminated it by its resolution and notice of November 7, 1899. The right of one party to terminate a continuing contract

[1] A rehearing was granted in this case June 19, 1902, and it has not yet been finally determined or reported.—REP.

upon substantial breach of its essential elements by the other, often inaccurately called "rescission," is one which has been treated in cases without number, both English and American, and with extreme refinement and technicality. Many of those cases are collated in a note to *Lake Shore & M. S. R. Co. v. Richards,* 30 L. R. A. 33 (152 Ill. 59, 38 N. E. 773); and the subject has been treated in *Norrington v. Wright,* 115 U. S. 188, 6 Sup. Ct. 12; *Farmers' L. & T. Co. v. Galesburg,* 133 U. S. 156, 10 Sup. Ct. 316; *School Dist. v. Hayne,* 46 Wis. 511, 1 N. W. 170; *Hoffman v. King,* 70 Wis. 372, 36 N. W. 25; *Walsh v. Myers,* 92 Wis. 397, 402, 66 N. W. 250. We do not, however, find it necessary to decide whether defendant has effectively terminated the contract in question, so that, should plaintiff, after the notice of termination, instal the additional lamps, it would be too late. We think defendant is foreclosed from such contention by reason of its course in this litigation, of which we shall speak later.

It appears from the foregoing that the plaintiff, by reason of nonperformance of the lighting contract on its part, was not entitled to recover at all upon its cause of action; hence, of course, a judgment allowing recovery upon certain conditions cannot prejudice the rights of the appellant. If not entitled to recover, it cannot be injured by placing conditions upon the privilege of recovery. So, as to that part of the judgment which provides that, upon burying wires and giving new bond within four months after notice of the entry of judgment, it may recover the sum sued for, without interest and without costs, the appellant has no just ground of complaint; and, were that all of the judgment, we should feel bound to affirm. But that is not all of the judgment. There is in addition a mandatory decree for specific performance of two of the duties assumed by the plaintiff under the ordinance, namely, the duty to bury that part of its wires specified in the ordinance of October 3, 1899, and to give

a bond, not in accordance with the demand of the resolution of August 1, 1899, but in complete accordance with the original franchise ordinance. We have already pointed out that the burying of the wires and the giving of a bond conditioned as demanded on August 1, 1899, are neither at all germane to the electric lighting contract upon which the suit is brought.

It is an interesting question whether a city, having secured for the benefit of its citizens, constituting a part of the public, certain agreements as a condition of the granting of a franchise on behalf of the state, may maintain an action in a court of equity for specific enforcement of those agreements. The subject is learnedly discussed, and an affirmative conclusion reached, in *Burlington v. Burlington Water Co.* 86 Iowa, 266, 53 N. W. 246; and *mandamus* was sustained in *State ex rel. Wis. Tel. Co. v. Janesville St. R. Co.* 87 Wis. 72, 57 N. W. 970. But in this case an obstacle lies at the threshold of considering and deciding that question. That relief is sought, not by an original suit in equity, but by way of counterclaim to a simple action at law for the recovery of money upon a contract which happens to be contained in the same writing as that which grants the franchise and imposes the conditions upon it. As we have already said, breaches of the conditions which relate only to the franchise can constitute no defense against the duty of the city to pay for the electric light which it agreed to purchase. They affect only the right of the plaintiff to continue to use the public streets for carrying on its business of manufacturing and selling such light, and so long as the state chooses to allow that franchise to continue, and the contracting company does furnish the lights as agreed, the duty of the city to pay therefor is not diminished or in any wise affected by the breaches of those conditions or agreements, unless, indeed, there should thereby arise a money injury to the city, for which it might be entitled to bring suit, and there-

fore might counterclaim to diminish or defeat the plaintiff's money recovery. From the earliest adoption of our Code authorizing counterclaims, it has been held, in pursuance of former New York decisions inhering in the statute when adopted by us, that a demand may be pleaded as counterclaim only when, if established, it would in some way qualify or defeat the judgment to which the plaintiff would otherwise be entitled. *Dietrich v. Koch,* 35 Wis. 618; *Heckman v. Swartz,* 55 Wis. 173, 12 N. W. 439; *Weatherby v. Meiklejohn,* 56 Wis. 73, 13 N. W. 697. Now, here it is apparent that quality does not exist. It is entirely consistent that the plaintiff, if it had fulfilled its lighting contract, might be entitled to recover the full contract price, and yet be under an obligation to perform certain of the other conditions contained in the same ordinance, pertaining to the franchise aspect thereof. If it were conceded that the defendant city might maintain a bill in equity to specifically enforce the contract to bury wires, that would in no wise defeat or qualify the right of the plaintiff to its money judgment. Hence it seems clear that, as to the two conditions or agreements made the subject of a decree of specific performance in this action, the defendant could not interpose a counterclaim for such result, even if it might maintain an independent suit for the same relief. So far, therefore, as the judgment before us contains a mandatory decree requiring the plaintiff, absolutely and not in the alternative, to bury wires and give bond, it is erroneous, to the hurt of the plaintiff. Hence we conclude the judgment must be modified by eliminating that portion decreeing specific performance of these obligations.

In sustaining the rest of the judgment, which gives plaintiff a money recovery on conditions, when it is entitled to no recovery at all, a word of explanation or interpretation seems necessary. In the counterclaim the defendant sets up past breaches, and threatened continuance of breaches, of

the contract, including those which we have held not germane to the cause of action stated in the complaint, and also the refusal to instal lights, which we have held to be germane. It substantially offered that, if the court concluded that the contract had not been effectively terminated and rescinded, the city was willing to continue it upon condition that all of the refusals to abide its terms were abandoned by the plaintiff, and to pay such sum as it ought to pay for any lights which had been furnished. It prayed variety of equitable relief, in the form of injunction, both prohibitory and mandatory, and in the form of specific performance. The glaring error in the judgment, which we have already pointed out, was the granting of absolute specific performance of duties having no relation to the cause of action stated in the complaint. The refusal of some form of equitable relief with reference to the failure of the plaintiff to instal additional street lights, if erroneous, was prejudicial only to the defendant; hence not to be supplied upon the plaintiff's appeal. We must, however, construe the judgment as taking the defendant at its word, and decreeing that the rescission or termination of the contract, if accomplished, is abandoned by the city; that the contract stands in full force against both parties; that plaintiff, not being legally entitled to recover any sum upon the street-lighting contract, should yet recover a somewhat arbitrary sum when and if it repaired certain omissions; and that its failure to repair such past omissions shall merely result in loss of the specified money recovery. Thus viewed, the judgment, at worst, erroneously denied only rights claimed by the defendant, except as it decreed specific performance. Its spirit was to relieve against the rescission claimed by the defendant, whom we consider to have assented thereto by not appealing. Its plan, also, was to allow plaintiff a reasonable opportunity after its rights were determined to perform the conditions whereby it should earn the money recovery.

But those rights never have been correctly determined; hence we deem it but equitable that the appellant should still have the four months, after final entry of corrected judgment, to perform the conditions imposed. We therefore shall reverse and remand with directions to enter a new judgment omitting the erroneous portion, instead of modifying the judgment here as of its original date.

By the Court.—The judgment is reversed, and the cause remanded with directions to enter judgment to the same effect as before, excepting the positive command therein contained for specific performance of certain contract provisions.

BARDEEN, J. I fully concur in the result reached in this case. It was not found necessary to determine whether the action taken by the city was effectual to constitute a rescission of its lighting contract. It attempted not only to rescind the contract for lighting, but also to put an end to its franchise to use the streets. As regards its attempt to oust the company of its franchise rights, granted to it by the city as the agent of the state, its action is held nugatory. That power rests in the state alone. The city claimed the right to rescind the lighting contract. That right is said to have been based upon the refusal of the company to instal some half a dozen incandescent lights ordered by the city. This refusal arose from a claim by the company that the second contract superseded the first, to the extent that further incandescent lights could not be required by the city. There was no claim that the company had abandoned its contracts, or was seeking to avoid their obligations, only in the respect just mentioned. The dispute was *bonâ fide,* and the claim of the company had some elements of plausibility. In such a case I very much doubt the power of either party to effectually terminate the contract by a mere declaration to that effect. But even if that power exists, under the facts

here presented, the court should be slow to uphold it. The language of the supreme court of the United States in *Rutland Marble Co. v. Ripley,* 10 Wall. 339, is quite applicable:

"That one party to an executory contract, partly executed, has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled."

See *Lundahl v. Hansen,* 147 Ill. 504, 35 N. E. 741; *Minah C. M. Co. v. Briscoe* (C. C.) 47 Fed. 276. Again:

"It is not every partial neglect or refusal to comply with some of the terms of a contract by one party which will entitle the other to abandon the contract at once. In order to justify an abandonment of it, and of the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by the misconduct or default." *Selby v. Hutchinson,* 9 Ill. 319.

Another element entering into the question of rescission is that the party rescinding must, so far as possible, put the opposite party in his original position. In continuing contracts this is frequently impossible, and hence the courts, when there are *bona fide* disputes, often say that the injured party must come into court before the rescission can become effectual. A declaration of rescission may become the basis for the court to declare it, but it is not always the case that the party himself has the right of absolute rescission. The courts recognize the distinction between executed and executory or continuing contracts in this regard, and it is one, I think, the city should have in mind in its future dealings with the company. The right of rescission at law usually rests upon such a refusal of the one party to perform as entitles the other to believe the contract has been abandoned. Such was the case of *School Dist. v. Hayne,* 46 Wis. 511, 1 N. W. 170. When the matter gets into a court of equity, the court may or may not decree a rescission, according to the equity of the case, and may even relieve from forfeiture

when the justice of the case demands, as in *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739. While the default of the company may be, as held in this case, sufficient to prevent a recovery of periodical payments due on the contract, it does not necessarily follow that the city may consider the contract at an end. If its remedy at law is not deemed adequate, its rights may be protected and enforced in the forum of equity, either by a decree of rescission or specific performance.

MARSHALL, J. I concur in the foregoing opinion by Mr. Justice BARDEEN.

Both parties moved for a rehearing. The motions were denied May 13, 1902.

PARK and others, Appellants, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent. 114 347 / 114 149

February 21—May 13, 1902.

Equity: Specific performance of contracts: Uncertainty: Discretion: Agreement to build branch railroad: Damages.

1. Courts of equity exercise their discretion in the matter of granting or refusing their aid to enforce specific performance of contracts; and may refuse such aid where a contract lacks certainty as to essential terms, even though the uncertainty exists by reason of defendant's fault, or when any of such terms depend on the will, discretion, or personal acts of individuals, so that a decree, if granted, might fail of complete efficacy.
2. A railway company agreed with certain residents of a village to build and operate a railway from its main line (some ten or fifteen miles distant) northerly through said village to the north line of the county, such railway to be build and located on such line and location as the company should thereafter determine. The starting point, under such agreement, might be at any point within a space of about twenty-five miles. The company afterwards refused to locate or build the railway.

Held, that a decree of specific performance might properly be refused.

3. Where a court of equity refuses to enforce specific performance of a contract it should not retain jurisdiction for the purpose of awarding damages for the breach thereof, if no reason is shown why such damages should not be recovered at law.

APPEAL from an order of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Affirmed.*

Appeal by plaintiffs from order sustaining demurrer to the complaint. That pleading sets forth that the plaintiffs are residents, owners of various kinds of property, and engaged in various kinds of business at Balsam Lake, the county seat of Polk county, to which there is no railroad nearer than that of the defendant, crossing the county east and west, ten or fifteen miles away; that the plaintiffs, realizing the needs of the village, and for its general improvement and growth, and in order to facilitate their own business and promote their individual pecuniary interests, organized a railroad corporation under the name of Superior, Balsam Lake & Southern Railway Company (hereinafter called "Balsam Lake Railway"), for the purpose of constructing and operating a railway from some point on an existing railroad to the village of Balsam Lake, and thence to the north line of Polk county; that fourteen shares of stock were subscribed by leading citizens of Polk county,—the majority thereof by the plaintiffs,—but nothing paid in thereon. They thereupon proceeded to secure aid from Balsam Lake and other adjacent towns, in some of which the aid had been voted, and in others merely petitions had been secured, but not voted on. They also made surveys for a line commencing on the main line of the defendant's railroad, and extending in a northerly direction to the village of Balsam Lake, and on northward to the county line. In August, 1900, they were progressing with their arrangements for financial aid and for the construction of said road, when they were requested to make a proposition to the defendant to build the desired

railroad facilities to Balsam Lake, whereupon they made a proposition reciting the various steps taken, the progress made with the several towns toward obtaining aid, the expenditure of considerable money and labor by the plaintiffs as promoters, and proposed to transfer the direction and control of the Balsam Lake Railway, together with all its rights, by the method of assigning stock or electing officers, at any time when requested by the defendant,—the existing officers to resign upon such request; also to transfer all stock then outstanding; also that certain of them would continue to aid in obtaining rights of way and municipal aid. In consideration thereof, the defendant corporation was to protect them against liability on their stock subscriptions; to pay certain promoters' expenses, amounting to some $6,800, and to agree that the Balsam Lake Railway or its assigns, or said defendant, would on or before September 1, 1901, build and operate a standard-gauge railroad from a point in Polk county on or south of the present main line of the Soo Railway, and thence northerly, by way of and touching the village of Balsam Lake, to the north line of said county, and connect the same in said county with the present main line of the defendant's railway; such railway to be built and located on such line and location as the defendant should thereafter determine.

The complaint alleges that after due consideration the defendant accepted such proposition, and noted its acceptance in writing thereon as follows: "The above proposition is hereby accepted and agreed to by the *Minneapolis, St. Paul & Sault Ste. Marie Railway Company.* Thomas Lowry, President. Approved. E. Pennington;" that the plaintiffs performed all of said agreement on their part, turned over their stock and control of the Balsam Lake Railway, and have been ready to do all other things in aid of the enterprise, as by said contract contemplated; that the defendant, though having paid the sum specified for promoters' ex-

penses, has wilfully and intentionally neglected to perform, and absolutely refuses to perform, the said agreement on its part to build and construct a railroad to Balsam Lake; that, on the contrary, it has surveyed and adopted a line for a railroad from a point on its main line northeasterly to a point near the north line of Polk county, intersecting the line of survey of the Balsam Lake road, and is engaged with a large force in constructing said line, which runs, at its nearest point, about seven miles away from Balsam Lake; that thereby the territory has been pre-empted, and the plaintiffs prevented from what would otherwise have been possible,—the securing some other company to build railroad connection for Balsam Lake,—and the enterprise of building such road themselves has been rendered unfeasible, because of improbability of the profit which would have resulted had the territory not been invaded by the defendant's new line; that thus trade will be diverted from Balsam Lake, it will be deprived of the advantages of a railroad, to which it was entitled under such contract, and great injury be occasioned to the plaintiffs in their property and business, which is incapable of being either estimated or compensated in money damages, and for which injury flowing from the breach of its contract by the defendant they have no adequate remedy at law; that the defendant is abundantly able financially to construct such road as contracted. They pray a decree requiring the defendant to perform said agreement in all respects, and especially to construct a railroad from the village of Balsam Lake to a convenient point on the main line of said road, and also to the north line of Polk county.

The demurrer was general, and was sustained by the court, by order, November 30, 1901.

W. F. Bailey, attorney, and *H. B. Walmsley* of counsel, for the appellants.

Alfred H. Bright, for the respondent.

The following opinion was filed March 11, 1902:

DODGE, J. From among the numerous objections urged by defendant to the maintenance of this action, there is one which seems to us very clearly to justify the conclusion reached by the trial court in the exercise of its judicial discretion,—that a court of equity ought not to undertake to specifically perform the contract set forth in the complaint, notwithstanding it should be found that such contract was entirely valid, upon a full consideration, and that its breach was unjustifiable and must do grievous wrong to the plaintiffs, incapable of adequate remedy in a court of law. That objection consists in the uncertainty and incompleteness of the contract as to the starting point and location of the proposed road. By the terms of that agreement, while at a distance of some thirteen miles or more the road must strike the village of Balsam Lake, the point of departure from the east and west line of defendant's railroad, running across the southern part of Polk county, is wholly undetermined. The contract is satisfied by starting the road at any point within a space of about twenty-five miles. Again, when that point is ascertained, the course of the road may be anywhere, at the will of the defendant, so that it reaches the village. Such uncertainty as this may not defeat the validity of the contract. It may be that defendant as much breaks the contract when it refuses to exercise its option and to build somewhere as if the location were defined, but the location of the road is not fixed and determined by the contract until, under its provisions, the defendant has exercised its option in that respect. It cannot be said that there is an agreement to build the road upon any line which the court might select; hence, should any line be adopted by the court, and the road be required to be built thereon, it would, in effect, be making a contract to build the road there, for the parties had made none. That courts of equity will not enter this field of sup-

plying elements of contract which the parties have not themselves included is, as a general proposition, so well settled as to hardly require more than simple statement. *Blanchard v. D., L. & L. M. R. Co.* 31 Mich. 43, 53; *McKibbin v. Brown,* 14 N. J. Eq. 13; *Schmeling v. Kriesel,* 45 Wis. 325, 328; *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 506, 85 N. W. 485.

True, it may well be urged that the selection of the starting point and of the course of the proposed railway rested wholly with the defendant, and, if it had performed its duty under the contract, all uncertainty would have been removed therefrom. There is much force to the argument that it ought not to profit by its own wilful defiance of its contractual obligation. Were the question new or unsettled, my personal inclination would tend strongly toward either compelling the defendant to exercise its option, or toward holding that it had forfeited its privilege of election and yielded to the plaintiffs or the court authority to select a line within the limits of the contract. The subject, however, is neither novel nor unsettled. At least as early as Lord ELDON'S day it was decided that courts of equity would exercise their discretion against undertaking specific enforcement of incomplete contracts, lacking certainty as to essential terms, although the uncertainty existed by reason of defendant's fault. *Wilks v. Davis,* 3 Mer. 507. That view has been followed with surprising unanimity by courts since. A few only of the cases need be cited: *Morgan v. Milman,* 3 De Gex, M. & G. 24, 34; *Taylor v. Gilbertson,* 2 Drew. 391; *Darbey v. Whitaker,* 4 Drew. 134; *Blanchard v. D., L. & L. M. R. Co.* 31 Mich. 43, 58; *Huff v. Shepard,* 58 Mo. 242, 247; *Domestic T. & T. Co. v. Metropolitan T. & T. Co.* 39 N. J. Eq. 160; *Woodruff v. Woodruff,* 44 N. J. Eq. 349, 16 Atl. 4; *Stanton v. Miller,* 58 N. Y. 192, 200; *Duffield v. Whitlock,* 26 Wend. 55; *Hopkins v. Gilman,* 22 Wis. 476.

At the foundation of that attitude of the courts is the principle that the plaintiff has no absolute right to the aid of a court of equity to enforce specific performance of the contract. His strict right is only to the remedy which common-law courts can give. Courts of equity therefore grant or decline their aid in their discretion, albeit a sound judicial discretion, guided, if not controlled, by precedents which have now pretty well defined its limits. *Williams v. Williams,* 50 Wis. 311, 6 N. W. 814; *Menasha v. W. C. R. Co.* 65 Wis. 502, 27 N. W. 169; *Mulligan v. Albertz,* 103 Wis. 140, 78 N. W. 1093. The field of activity being discretionary, one consideration which has led the courts to decline attempts to enforce contracts when any of the terms depend on the will, discretion, or personal acts of individuals, is their reluctance to proceed where their decree may by any possibility fail of complete efficacy. A very early illustration of this attitude is the famous opera-singer case. *Lumley v. Wagner,* 1 De Gex, M. & G. 604. Another still earlier is *Kemble v. Kean,* 6 Simon, 333. In these the court refused to attempt to decree specific performance of contracts to sing or to act at specified theaters. Obviously a decree of specific performance might in such case fail of its purpose if the defendant resisted to the extent of enduring punishment for contempt. A conveyance of land can be effected by the decree itself, although the defendant refuse to obey it. The performance of certain work, in the like contingency, the court can accomplish through its receiver. But a decree in equity, neither *ex proprio vigore,* nor through the medium of a master or a receiver, can supply the opera singer's music which the contract contemplated. So, here, where the contract calls for a junction point to be fixed by the defendant, of course through its officers, the court cannot ascertain that point if those officers refuse to act. That the court cannot adequately perform the duty of those officers is, of course, apparent.

The considerations involved in the selection of a junction point or branch are multitudinous, complicated, and of grave importance. Those involving questions of mechanics, engineering, and expense hardly compare in importance with others relating to the safety and convenience of the defendant's railway, and therefore of its patrons, the public, which, even in the light of the fullest evidence, must be in large measure beyond the ken of a court. The importance of such an act, and the necessity that it be done in light of the broad general policy of the company, is recognized by statute; for sec. 1831, Stats. 1898, takes from the ordinary executive officers authority to select the place and route for a branch railroad, and requires that it be passed upon by the board of directors. The court cannot, even aided by all possible evidence, make the selection as the defendant company was by the agreement to make it, and, in any attempt so to do, may outrage the contract instead of enforcing it. For this reason, we must decline to disturb the conclusion reached by the trial court in the exercise of his judicial discretion,—not to undertake specific performance of defendant's promise to build a railroad to Balsam Lake.

None of the reasons exist here which have sometimes led courts of equity to give redress by way of damages when they find specific performance beyond their power or duty. The present case is before us at its very inception. Testimony has not been taken. No bar of limitation has run against a proper action at law. The plaintiffs' damages may perhaps yet be affected by their own efforts to supply what defendant contracted to give them. Such damages may, upon the evidence, be of a character incapable of computation, and especially within the proper field of decision by a jury. Further, it must not be overlooked that, as a general rule, legal rights should be enforced in a court of law, where the constitutional right to trial by jury is preserved. Only in exceptional cases, where unnecessary hardship clearly de-

mands, should courts of equity assume that province. *Combs v. Scott,* 76 Wis. 662, 671, 45 N. W. 532; *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75; *Blanchard v. D., L. & L. M. R. Co.* 31 Mich. 43, 59.

By the Court.—The order appealed from is affirmed.

A motion by the appellants for a rehearing was denied May 13, 1902.

GRUNERT, Appellant, vs. SPEICH and another, Respondents.

February 22—May 13, 1902.

(1) *Discontinuance.* (2) *Promissory notes: Payment: Estoppel: Account stated.* (3) *Appeal: Consideration of facts not found: Exceptions.*

1. After a cause has been submitted for decision plaintiff cannot discontinue without the assent of the court.
2. Plaintiff, who was defendant's financial agent, at their request paid their note to a bank, and charged the amount to them in their account. Afterwards an account was stated between the parties, whereby, with defendants' assent, the note was taken out of the account, to be held by plaintiff as an outstanding obligation. Plaintiff then collected the amount of the note from one W., an accommodation maker with defendants, but was compelled, at the suit of W., to make restitution on the ground that the note had been paid by plaintiff at the bank. Plaintiff repossessed himself of the note and brought action thereon against defendants. *Held,* that defendants are estopped to assert that the note is not, as to them, an outstanding obligation.
3. Where facts established at the trial, but erroneously omitted from the findings, entitle plaintiff to judgment as a matter of law, the appellate court may, on appeal from a judgment for defendants, consider such facts and direct a judgment accordingly, in order to prevent great injustice, even though there was no exception to the omission of the trial court to find such facts.

APPEAL from a judgment of the circuit court for Green county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

Action to recover on a promissory note, dated August 31, 1895, signed by the defendants with one Wyss as their ac-

commodation maker, whereby they agreed to pay the Citizens' Bank of Monroe, Wisconsin, or order, $2,000 on demand after date. Defendant *Marty* answered that plaintiff purchased the note of the bank and that it was fully paid before the commencement of the action; that after plaintiff became the owner thereof he and Wyss induced defendants to give security therefor to Wyss; that Wyss paid the note to plaintiff, and defendants secured the former as requested, and that he realized upon the security sufficient to fully cancel the indebtedness. The answer further alleged payment by defendant *Speich*. Defendant *Speich* answered separately, pleading the same matters, substantially, as his codefendant.

The cause was tried by the court. The evidence conclusively established the following facts: When the note was given, for a considerable time theretofore and thereafter, defendants were manufacturers of cheese and plaintiff was their financial agent. He took their cheese products and sold them on commission, crediting defendants with the proceeds upon his books and paying them money from time to time on account. He also furnished them considerable quantities of supplies from time to time, and indorsed notes for them which he subsequently took up, charging money paid in the latter transactions and for supplies to defendants' account. February 20, 1896, defendants requested plaintiff to pay for them the note in suit, which he did. The paper was delivered to him by the bank, unindorsed, and was retained by him. On April 22, 1896, he rendered defendants a bill of their account showing debit items, including the amount paid on the note, aggregating $22,385.20, and credits to the amount of $20,247.33. Defendants kept such bill, and the circumstances were such that it became an account stated between the parties. June 1, 1896, plaintiff again rendered defendants a second bill of their account, in which the note was credited back to them, indicating that it was held as an outstanding obligation. Such statement of account indi-

cated that defendants owed plaintiff $2,951.95. The last bill was retained by defendants without objection, and the circumstances were such that it became an account stated between the parties. Thereafter plaintiff demanded pay on the note from Wyss, and he in turn demanded of defendants that they should protect him. Thereafter defendants, with the knowledge and advice of plaintiff, gave security to Wyss, and he paid the plaintiff. The security turned out to be of little value. The only sum realized applicable to or applied on the note was $300. Subsequently Wyss obtained what he supposed was credible information that plaintiff did not purchase the note of the Citizens' Bank, but that he paid it for defendants. Thereupon he sued all the parties to this action for jointly imposing upon him to his damage, to the extent of the money paid on the note and interest. The defendants in this action set up as a defense substantially the same facts as those contained in their answers now. The case was tried, the issues being whether *Grunert* paid the note for *Speich* and *Marty* at the bank or purchased it, and whether *Speich* and *Marty,* after the note came to the possession of Wyss, paid him. The circuit court decided both such issues in favor of Wyss, except that he had received from *Speich* and *Marty* $300. The court further decided that all the parties were guilty participants in fraudulently inducing Wyss to pay the note to *Grunert.* Judgment was rendered accordingly. *Grunert* and *Speich* and *Marty* joined in an appeal to this court. The judgment was affirmed on the following facts: First, that *Grunert* paid the note at the Citizens' Bank for the account of *Speich* and *Marty;* second, that he fraudulently induced Wyss to pay him, pretending that the note was still an outstanding obligation upon which he, Wyss, was liable; third, that *Speich* and *Marty* recognized Wyss as the owner of the note after he came to the possession thereof, and paid him $300 thereon but no more. The decision of the lower court as to *Speich* and *Marty* being guilty partici-

pants in the fraud was reversed on the ground that there was no finding of fact or allegation in the complaint connecting them therewith, and that the evidence did not clearly show guilt on their part; on the contrary, that it tended to show that they believed, from the fact that the note was credited back to them in the second bill rendered and from the state of their account as shown by such bill, that the note was an outstanding obligation, and indicated by their conduct that they preferred to deal with Wyss with reference to it rather than with *Grunert*. [108 Wis. 38.]

Appellant paid the Wyss judgment, repossessed himself of the note, and thereupon brought this suit. Proof of all the facts in regard to the prior case was made by the introduction of the record in evidence, and by evidence independently thereof. None of such facts are covered by the findings filed by the trial court, except those in regard to the making of the note to the Citizens' Bank, there being a running account between plaintiff and defendants, and that the latter requested the former to take up the note for them. The bills rendered and the book account were offered in evidence, and there was testimony that *Grunert* was requested to pay the note for defendants, but there was no direct evidence that he was told by them to charge the note to them. The trial court found that *Grunert* was requested by *Speich* and *Marty* to pay the note and to charge it to their account; that in April, 1896, they had credit on such account sufficient to discharge all their liabilities to *Grunert*, including the note; that no applition of any credit items in payment of any debit items was made prior to the commencement of this suit; that Wyss paid the note in full to *Grunert* without any knowledge that the same had been previously paid by the defendants.

As a conclusion of law the court found that the credits to defendants upon *Grunert's* books should be applied, so far as necessary, in discharge of any claim of plaintiff upon the note. Judgment was rendered accordingly.

After the case was submitted for decision the plaintiff offered to pay the costs of the suit and gave notice of a discontinuance. Defendants' counsel refused to receive the costs or to consent to a discontinuance. Thereupon plaintiff's counsel obtained an order to show cause why he should not be permitted to discontinue. Before the return day of the order, findings were filed and judgment was rendered, and upon such return day the motion for leave to discontinue was denied.

For the appellant there was a brief by *P. J. Clawson, A. S. Douglas,* and *James Lane Allen,* attorneys, a supplemental brief by *Mr. Clawson* and *Mr. Douglas,* and oral argument by *Mr. Clawson.*

For the respondents there was a brief by *Smith & Pierce,* attorneys for *Marty,* and *J. L. Sherron,* attorney for *Speich,* and oral argument by *W. M. Smith* and *C. E. Pierce.*

The following opinion was filed March 11, 1902:

MARSHALL, J. It was not a very orderly procedure to grant a hearing on a motion for leave to discontinue and to render judgment before the day for the hearing, but we are unable to see wherein appellant was prejudiced thereby. Moreover, the order denying the motion for leave to discontinue was made after judgment and cannot be reviewed upon appeal from the judgment. If we consider the motion as having been impliedly denied, and the order granting a hearing dismissed by the entry of judgment, and in that light that the ruling is here for review, appellant has still no good ground to complain except as to the manner in which the matter was disposed of, which, of course, does not go to the merits thereof. Since the case had been submitted for decision when the effort to discontinue was made, plaintiff had no absolute right to so terminate the litigation. Sec. 2856, Stats. 1898. There was no way in which his effort to discontinue could have been made effective without the order

of the court, and manifestly it was justified in refusing to grant such a favor after the case had been fully tried and was ready for judgment. Under any circumstances, the assent of the court to a discontinuance was necessary in order to render it effective. *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158.

It seems that the true history of this cause, for some reason, did not find a place in the findings filed by the learned trial court. As indicated in the statement, no fact appears in the findings in favor of respondents upon which they relied in their answers, nor on the evidence upon which appellant relied to obtain favorable findings entitling him to judgment, notwithstanding the decision of this court, previously rendered, that he purchased the note for the account of respondents. All those matters seem to have been ignored, though the findings made are in accord with evidence which is unimpeachable as to any material particular, and on their face support the judgment. Probably the trial court announced a decision in favor of defendants and thereafter signed findings which counsel prepared, covering only such facts as they supposed would support such decision, the court relying upon counsel to prepare findings covering all the litigated questions deemed by either party material to the cause, which were within the issues made by the pleadings or litigated on the trial. That is a common practice, but not a safe one, unless the trial judge is careful to see that the findings cover the case properly, before affixing his signature thereto. Counsel, in the earnest pursuit of the particular interest they represent, are liable to lose sight of others, and that tendency is to be guarded against. The cause, as now presented, is further complicated by the fact that there are no exceptions to the court's failure to find upon all the material facts. So far as this court is concerned it would perhaps be justified in affirming the judgment because it is supported by the findings and the findings are not contrary to the evidence in any

material particular. If that course were always pursued there would be many cases where serious injustice would be done, attributable, perhaps, wholly to failure to so try the case as to bring clearly to the attention of the court the errors in the record which are relied upon.

The exceptions to the findings of fact, as we view the case, can be passed over briefly. The first material finding on matters in dispute is that respondents requested appellant to pay the note and to charge it to them in their account. There is no direct evidence to that effect; but since the evidence shows that appellant was respondents' financial agent, that they relied upon him largely for money to conduct their business, that their money came from the proceeds of manufactured products turned over to him to be sold on commission for their account, that the proceeds of their business substantially all came through his hands, the reasonable inference is that when they told him to pay or take up the note for them the understanding was that it was to be paid for and charged to them as a canceled obligation. That is probably the way the trial court viewed the matter. The next finding excepted to is that at the time the note was paid, and for a considerable time prior thereto, and thereafter, appellant sold respondents' products on commission and that there was a running open account between them. There is no dispute about that in the evidence. The next finding complained of is that in April, 1896, respondents' credits with appellant exceeded their indebtedness to him on account, including the note. That does not definitely appear. If the case were to turn on that finding it would be very difficult to sustain the judgment. In any event, as appears, the account was stated between the parties April 22, 1896, at which time there was a balance due appellant over and above the note. Moreover, we do not deem that material. If appellant was requested to pay the note for the account of respondents, the understanding being that it was to be charged to them and not

held as an independent debt, and it was charged accordingly, as the fact is, it ceased to exist as an outstanding obligation and could not thereafter, without consent of respondents, express or implied, be restored to its former status. So it is immaterial whether the credit items of the respondents were sufficient to extinguish the note and all their other indebtedness to appellant in April, 1896. The next finding objected to is that no application was made of particular credit items in discharge of particular debit items, in the book account, prior to the commencement of the suit. There is no dispute about that in the evidence. The last finding excepted to is that Wyss paid the note in full to *Grunert*. That is not disputed. Upon such findings, obviously, respondents were entitled to judgment, if the court was justified, under the circumstances, in disregarding the undisputed facts to which we have referred, not mentioned in the findings, though there is hardly a circumstance found by the court that can be referred to any issue raised by the pleadings.

As indicated in the statement, the defense pleaded in respondents' answers was litigated in the suit of Wyss against the parties to this action, the facts being found against them. That the case was dismissed as to them does not militate against the effect of such findings. They were heard fully on their claim that appellant purchased the note and thereafter obtained his pay of Wyss, and that they paid Wyss. The decision was against them, except that they paid Wyss $300. The judgment of dismissal was based in part on such determination. The issues in that regard were decided in reaching the final judgment, and were closed thereby as to all the parties to the litigation as much as any issue in the case. The introduction in evidence of the record of that cause, upon the trial of this case, was a complete answer to respondents' pleaded defense. Moreover, it established the facts that the transaction between Wyss and *Grunert* was fully rescinded, that the note was thereby restored to *Gru-*

nert, that respondents did not part with anything of value to Wyss as a payment upon the note while he possessed it, except the $300, and that they fully acquiesced in *Grunert* treating the paper as an outstanding obligation against them after he purchased it, so that a change of their position in that regard would necessarily prejudice him.

The learned counsel for respondents, knowing the aforesaid facts when the answers in this case were drawn, were too wise to put forward, as a defense, payment of the note to *Grunert* by its being charged in the running account. They evidently depended upon defeating it upon the ground that respondents paid it to Wyss after his payment thereof to *Grunert,* thinking that, notwithstanding the decision in the former case, respondents could retry that question, the final result before, as to them, being a dismissal of the cause, though it was grounded on the fact that they had not paid Wyss anything except the $300, but were not parties to the fraud in securing payment from him by *Grunert.* The trial court, we assume from the findings, rightly decided against that view and rendered judgment for respondents, overlooking the effect upon the rights of the parties of those things which occurred after the note was charged in the bill rendered, as part of the running account between them.

There can be no controversy but that *Grunert's* taking up the note and rendering the first bill in which it was charged to respondents, and their acquiescence therein, looking at those facts most favorably to them, constituted an account stated between the parties, which could not thereafter be changed without the consent of all of them, except for fraud of one party and mistake of the other, or mutual mistake. The way was open, however, for the parties to give new life to the note as between themselves, but not as to Wyss without his consent. It was perfectly competent for respondents to consent to have the note credited back to them and held by *Grunert* as an outstanding obligation. If that was done,

they were as effectively bound by the note as if it had never formed a part of the account. That is too clear for reasonable controversy. The subsequent rendition of the bill of account, to which respondents fully assented, and their unqualified recognition of the note as a valid obligation, leave no room for doubt but that they consented to have it taken out of the account and restored to its former efficiency. While the whole proceeding of taking the note out of the account and collecting it of Wyss was a fraud upon him, it is by no means certain that there was moral turpitude in the matter on the part of anybody. Neither appellant nor respondents probably understood the legal effect of their actions. At the time the note was collected of Wyss respondents owed the amount thereof, either on the note or as a part of their indebtedness on account to *Grunert*. The circumstances were such that they could not make immediate payment to either Wyss or *Grunert*, and that insistence upon such payment meant suspension of their business. Wyss was in a position to carry them, it seems, better than *Grunert*. He did that for some time, giving them an opportunity to use their best efforts to pay the note without serious embarrassment. So they were not injured, but rather benefited, at least were favored, by the paper being taken out of the account and collected of Wyss.

The result of all the transactions before detailed is that the account between *Grunert* and respondents was fully settled, with the note treated as an independent obligation, and that *Grunert* thereafter expended large sums of money on the faith of respondents' assent to that situation, and that they will not be prejudiced at all by being compelled to meet the amount due on the note after giving them credit for the amount they paid Wyss. They owe the balance justly, either upon the note or upon the account. As the account stands, it cannot be legally considered to include anything paid by *Grunert* for the note. The mere fact that he was com-

pelled to make restitution to Wyss did not give him any right to restore the note to the account, or to charge respondents with money paid to discharge the Wyss judgment. He did not discharge such judgment for respondents' account or at their request. It represented the damages suffered by Wyss by the wrongdoing of *Grunert*. The transaction between him and Wyss was rescinded by the latter, and the note restored to him or placed at his disposal long before he paid the judgment for damages. The account having been settled with the note out of it, it cannot be surcharged and the note or the amount paid Wyss restored thereto except for fraud or mistake between the parties to the account, and it is difficult to see how either could be shown. The upshot of the whole situation is that if respondents were sued on the account by *Grunert*, he would be met with the account stated, with a fair probability, at least, that he could not change it. So the result is that the conduct of respondents has been such that, unless they are estopped from prevailing against the note upon the ground that it was extinguished by including it in the account stated,—one, as before indicated, which they did not pretend to rely upon in their pleadings,—they will probably succeed in escaping from paying the note or refunding the money paid for them to take it up, except as to the $300 paid Wyss; and if they are held estopped by their conduct from being heard successfully to claim that the note was extinguished by being paid for and charged in their account appellant will obtain judgment for the amount paid for them for the note, less what he has already received, being the $300 paid Wyss, and the interest, $66.50, which was left charged in the account at the time the note was taken out. In the event of appellant having judgment as indicated, and respondents being compelled to pay the same, they will not pay a dollar other than what they honestly owe.

That the plainest principles of estoppel *in pais* apply to the situation above indicated, precluding respondents from

prevailing on the facts found by the trial court, does not require discussion. A person cannot change his position at will in his dealings with another regardless of that other's interests. Having once assented, in such dealings, to a particular line of conduct, so that a change of his attitude, if allowed to prevail, would operate to the prejudice of such other, he cannot make the change. *Frei v. McMurdo,* 101 Wis. 423, 77 N. W. 915. In the case cited the rule is stated to be general that, 'if a person takes a position for the purpose of inducing another to act in a particular way, or with knowledge or reasonable means of knowledge that he will thereby be induced to so act to his injury if such position be changed, and such other does so act, such person is bound by his position so taken, without regard to whether it was in accord with the truth or not.' The trial court here found, on sufficient evidence, that the note was paid to be charged by appellant in the account between the parties. Respondents, beyond question, acquiesced in its being taken out of the account. If they did not know the purpose thereof as to Wyss, they certainly knew the effect thereof as to themselves, and to that extent restored the note. That, of itself, is sufficient to preclude them from defending upon the ground that the note was extinguished in the account. Their subsequent conduct effectually estops them from making any such defense.

It is so clear from what has been said that the judgment appealed from is wrong, and that great injustice would be done appellant if the error were not corrected notwithstanding the failure of appellant's counsel to properly except to the trial court's omission to make findings upon the vital issues in the case, that it is the duty of the court to right the wrong, since the power to do so exists, and the settled practice leaves the way clear for the court to do so. It has been held that on appeal the court will not consider facts disclosed by the evidence, constituting a defense or cause of action but not covered by the findings, unless the error below, in failing to

make findings in regard thereto, is preserved by proper exceptions. *Mead v. Chippewa Co.* 41 Wis. 205; *Wrigglesworth v. Wrigglesworth,* 45 Wis. 255; *Barry v. Schmidt,* 57 Wis. 172, 176, 15 N. W. 24; *Darling v. Neumeister,* 99 Wis. 426, 75 N. W. 175. But that rule is subject to several important exceptions. Manifestly that must be so. If arbitrarily applied as a universal rule, the function of the court to correct errors would often fail to accomplish justice notwithstanding manifest errors. True, the duty of the court to correct error does not necessarily include the duty to search for errors to be corrected, but it would appear to include the power to correct those which are manifest and which the party prejudiced thereby clearly did not intend to waive. The general rule undoubtedly is that the failure to except implies a waiver of the error if there be one. But that has not been applied to those errors which are obvious and relate to material issues of fact upon which the judgment rests or should rest. The court may look into the record and affirm a judgment upon the evidence if it is clearly supported thereby, though on the findings it would have to be reversed, notwithstanding the failure to find the material fact or facts so manifestly disclosed by the record was not excepted to. *Jones v. Jones,* 71 Wis. 513, 38 N. W. 88; *Raipe v. Gorrell,* 105 Wis. 636, 81 N. W. 1009. A judgment may be affirmed on the evidence in such a case, even though the essential facts are not thereby shown to exist without dispute. It is sufficient if they are established to a reasonable certainty. *Maldaner v. Smith,* 102 Wis. 30, 41, 78 N. W. 140; *Hamilton v. Menominee F. Q. Co.* 106 Wis. 352, 81 N. W. 876; *Brown v. Griswold,* 109 Wis. 275, 285, 85 N. W. 363. In *Wetzler v. Duffy,* 78 Wis. 170, 47 N. W. 184, it was held that the general rule, that the court will not consider any fact disclosed by the evidence but erroneously left out of the findings unless there is an exception thereto preserved in the record, "is only applicable to a case

where the testimony sustains the findings made by the court, and there is not sufficient evidence in the case to require, as a matter of law, a finding different from those found by the court upon some other material matter." Here the material matters pleaded in the answers were disproved, and those relied upon by the plaintiff to meet the facts found by the court were established as a matter of law, and of course should have been covered by the findings. If they had been so covered, the conclusion of law from all the facts would necessarily be as above decided.

When the note was taken out of the account it was credited to respondents at $2,000, the $66.50 interest paid by appellant being left in the account; $1,847 of the damage paid Wyss by *Grunert* represented the principal sum due on the note after crediting the $300 paid Wyss by respondents. Between them and appellant the amount of principal then due was $66.50 less than $1,847. That, as indicated, is because, while the interest paid by *Grunert* to the bank, $66.50, remained charged to respondents in the account, *Grunert* collected the same from Wyss. The result is that respondents justly owe on the note to appellant $1,780.50 and interest thereon at the rate of seven per cent. per annum from September 18, 1896. A judgment should be rendered in his favor accordingly.

By the Court.—Judgment is reversed, and the cause remanded with directions to render judgment in favor of the plaintiff as indicated in this opinion.

A motion by respondents for a rehearing was denied May 13, 1902.

WISCONSIN MARINE & FIRE INSURANCE CO. BANK, Appellant, vs. DURNER and another, Respondents.

April 22—May 13, 1902.

Injunction: Dissolution: Damages: Appealable order: Attorneys' fees.

1. **An order confirming the report of the referee appointed, after the dismissal of an action, to ascertain the damages sustained by reason of an injunction, is a "final order affecting a substantial right made in special proceedings," and is appealable under subd. 2, sec. 3069, Stats. 1898.**
2. **The damages sustained by reason of an injunction properly include attorneys' fees for services rendered in procuring the dissolution of the injunction, and also for services upon the reference to ascertain damages.**

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

It appears from the record that April 4, 1899, the Wisconsin Trust Company, as administrator of the estate of Julius Luebke, deceased, recovered judgment in the circuit court for Milwaukee county against this plaintiff for $40,657.67, which judgment was affirmed on appeal to this court. 105 Wis. 464, 469, 81 N. W. 642. Thereupon the Wisconsin Trust Company resigned as such administrator, and the defendant *Emma J. Luebke,* the widow of the deceased, was appointed administratrix in its stead, and she thereupon issued execution to collect the amount of the judgment. April 4, 1900, the plaintiff herein commenced this action against *George Durner* as sheriff and *Emma J. Luebke* as administratrix of such estate, to restrain them from enforcing such execution. To obtain such injunction, an undertaking was given on the part of the plaintiff, reciting the facts mentioned, and signed by Thomas J. Durnin and Alfred James, wherein they thereby undertook that the plaintiff, the *Wisconsin Marine & Fire Insurance Company Bank,* would pay to the parties enjoined "such damage, not exceed-

ing the sum of $500, as they or either of them may sustain by reason of such injunction, if the court shall finally decide that the plaintiff is not entitled thereto, and such damages may be ascertained by reference or otherwise, as the court shall direct." Thereupon, and on April 4, 1900, upon the verified complaint in this action and such undertaking, an order was obtained from a court commissioner restraining the defendant *George Durner,* as sheriff, and his deputies and employees, and the defendant *Emma J. Luebke,* and each of them, until the further order or judgment of the court, from proceeding in any way or manner to enforce such execution out of the property of the plaintiff.

Thereupon *George Durner* and *Emma J. Luebke,* respectively, answered the complaint herein upon the merits, and obtained an order to show cause why such injunctional order should not be vacated and dissolved. That motion was heard "upon the records, pleadings, and papers theretofore served and on file," and an affidavit on file in behalf of the plaintiff, and it was ordered by the circuit court, May 19, 1900, that such injunctional order be, and the same was thereby, set aside and dissolved, with $10 costs against the plaintiff, and in favor of the defendants.

The cause having been brought to trial upon the merits, January 16, 1901, and the circuit court having granted the motion of the plaintiff to dismiss the complaint herein, thereupon directed judgment to be entered in favor of the defendants dismissing the plaintiff's complaint, with costs; and it was thereupon adjudged that the complaint in this action be dismissed, and that the defendants recover of the plaintiff $32.70 taxed as costs and disbursements, and have execution therefor, and such judgment was duly docketed in the clerk's office February 14, 1901.

February 18, 1901, the circuit court, on its own motion, ordered that a compulsory reference be, and the same was thereby, made to John F. Harper, circuit court commis-

sioner, "to ascertain and determine the damages sustained by the said defendants, or either of them, by reason of the said injunctional order herein, and report the same" to the circuit court. June 25, 1901, Harper, as referee, made and filed his report, to the effect that an allowance should be made to the defendants for the services of attorneys employed by them in procuring the dissolution of such injunctional order, and that the reasonable value of such services, for which the defendants were liable, amounted to $300, and that the reasonable value of the services of counsel for the defendants upon such reference should be allowed as part of the damages recoverable upon such undertaking, and that the same amounted to $25, and that he therefore found and reported to the court that such damages be and thereby were allowed by reason of the dissolution of the injunction upon the undertaking given in procuring the same, and should be and are $325. Upon the hearing of an order to show cause to the contrary, made June 27, 1901, the circuit court, on July 6, 1901, after hearing the attorneys for the respective parties, "ordered that said report of the referee, fixing the damages sustained by the plaintiff under the undertaking, by reason of the injunction issued herein, at the sum of three hundred and twenty-five dollars, be, and the same hereby is, in all respects ratified and confirmed." From that order the plaintiff appeals.

The cause was submitted for the appellant on the briefs of *Fish, Cary, Upham & Black.* They cited, besides cases cited in the opinion, *Wisecarver v. Wisecarver,* 97 Va. 452, 34 S. E. 56; *Stringfield v. Hirsch,* 94 Tenn. 425, 29 S. W. 609; *Oliphint v. Mansfield,* 36 Ark. 191, 195; *Sensenig v. Parry,* 113 Pa. St. 115, 5 Atl. 11; *Wood v. State,* 66 Md. 61, 5 Atl. 476; *Galveston, H. & S. A. R. Co. v. Ware,* 74 Tex. 47, 11 S. W. 918; *Jones v. Rosedale St. R. Co.* 75 Tex. 382, 12 S. W. 998; *Canadian & A. M. & T. Co. v. Fitzpatrick,* 71 Miss. 347, 16 So. 877; *New Nat. Turnpike Co. v. Dulaney,*

86 Ky. 516, 6 S. W. 590; *Bennett v. Lambert,* 100 Ky. 737, 39 S. W. 419; *Williams v. Allen* (Ky.) 54 S. W. 720; *Barrett v. Bowers,* 87 Me. 185, 32 Atl. 871; *Noble v. Arnold,* 23 Ohio St. 264; *Riddle v. Cheadle,* 25 Ohio St. 278; *Carnes v. Heimrod,* 45 Neb. 364, 63 N. W. 809.

For the respondents there was a brief by *Miller, Noyes & Miller,* and oral argument by *A. W. Fairchild.*

CASSODAY, C. J. The terms of the undertaking in question are, in substance, the same as prescribed by the statute, which declares "that the plaintiff will pay to the parties enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct." Sec. 2778, Stats. 1898. This language was taken literally from sec. 222 of the New York Code. Here the court directed that such damages should be ascertained by such reference. This is in accordance with the established practice in this state. Thus, it has been repeatedly held that, "where a preliminary injunction was improperly granted, the party enjoined, after a judgment on the merits in his favor, may have a reference to assess his damages sustained by reason of such injunction." *Parish v. Reeve,* 63 Wis. 315, 322, 323, 23 N. W. 568; *Kane v. Casgrain,* 69 Wis. 430, 34 N. W. 241; *Avery v. Ryan,* 74 Wis. 591, 43 N. W. 317; *Independent Order of Foresters v. United Order of Foresters,* 94 Wis. 241, 242, 68 N. W. 1011. In establishing such practice, this court simply followed the rulings of the New York courts under their statute, from which ours was borrowed. Among the cases in that state in support of that practice are *Methodist Churches v. Barker,* 18 N. Y. 463; *Jordon v. Valkenning,* 72 N. Y. 300; *Pacific M. S. Co. v. Toel,* 85 N. Y. 646. The order of reference was not made until some time after the trial court

had finally decided that the plaintiff was not entitled to the injunction, and had dismissed the action. The referee only allowed damages for procuring the dissolution of the injunction, and the order confirming the same is correspondingly limited.

1. It is claimed that the order is not appealable. In view of the language of the statute quoted, and the fact that the court directed the reference after the action had been dismissed, the order comes directly within the language of the statute, which authorizes an appeal to this court from "a final order affecting a substantial right made in special proceedings." Subd. 2, sec. 3069, Stats. 1898; *Rose v. Post,* 56 N. Y. 603; *Newton v. Russell,* 87 N. Y. 532. We must hold that the order is appealable.

2. The plaintiff contends that the trial court improperly allowed counsel fees to be recovered as damages. In the case from New York court of appeals, just cited, as here:

"The referee allowed counsel fees for services rendered on the motion to dissolve the injunction, *and also on the reference.* These were the items questioned. *Held,* that the law upon this question has been too long and well settled to admit of doubt as to the propriety of the allowance." *Rose v. Post,* 56 N. Y. 603.

This was simply following the rule which had long been maintained in the courts of that state. *Edwards v. Bodine,* 11 Paige, 223; *Aldrich v. Reynolds,* 1 Barb. Ch. 613; *Corcoran v. Judson,* 24 N. Y. 106; *Andrews v. Glenville W. Co.* 50 N. Y. 282; *Newton v. Russell,* 87 N. Y. 531. Such rule seems to be regarded as having the support of the great weight of authority, even in states holding otherwise. *Stringfield v. Hirsch,* 94 Tenn. 425, 430, 29 S. W. 609, citing High, Inj. § 1685. Counsel for the plaintiff concede that a number of states, and perhaps most of the states, as claimed by counsel for the defendants, have followed the rule thus long ago established in New York; but they contend that

"the safer and better rule, and more consistent with the policy of the law of this state," is that which is maintained in the federal courts, where such counsel fees are not allowed,—citing *Arcambel v. Wiseman,* 3 Dall. 306; *Oelrichs v. Spain,* 15 Wall. 211. See, also, *Tullock v. Mulvane,* 184 U. S. 497, 22 Sup. Ct. 372; *Missouri, K. & T. R. Co. v. Elliott,* 22 Sup. Ct. 446, 450. It is true, as stated by counsel for the plaintiff, that the first of these cases was followed in *Gear v. Shaw,* 1 Pin. 608, 615. But that decision was made in 1846, by the territorial court, which, of course, was bound to follow the supreme court of the United States upon the question. Besides, that decision was made long before the adoption of the statute from New York, above quoted. So far as this court has spoken upon the construction to be given to that statute, it has been in harmony with the New York adjudications. We feel constrained to follow the well-established rule in New York from which we borrowed the statute under which the question arises.

By the Court.—The order of the circuit court is affirmed.

TOWN OF MILWAUKEE, Respondent, vs. COUNTY OF MILWAUKEE, Appellant.

April 22—May 13, 1902.

Villages: Invalid organization cured: Double collection of taxes by county: Recovery by town.

A village organized under an invalid statute borrowed money from the state trust funds. Afterwards it was by law made a village and charged with the obligation to repay the money. A tax covering an instalment of the debt was collected twice by the county,—once from the village and once from the town in which the village was situated; but only the amount of the tax was paid over to the state. *Held,* that the amount retained by the county belonged to the town, and might be recovered by it.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This is an action for money had and received. It was commenced by the filing of a claim by the plaintiff with the county board of the defendant, claiming to recover the sum of $525. The claim was disallowed by the county board, and the plaintiff appealed to the circuit court. Trial by jury was waived, and the action was tried by the court. The facts material to the case were substantially undisputed, and were as follows:

In 1892 the village of Whitefish Bay was organized under the provisions of ch. 40, R. S. 1878, being composed of territory within the limits of the town of Milwaukee. No vote was ever taken upon the question whether such village should become an independent organization for the purposes of taxation, as provided by ch. 341, Laws of 1889, but immediately upon organization of the village an assessor was elected, and the village proceeded to collect its own taxes, and continued so to do until the year 1896. During this period the county officers treated the village as a separate taxing district, and the county clerk certified its proportion of state and county taxes directly to the village authorities for collection. At some time during this period the village made a loan of the state trust funds of a considerable sum for school purposes, the entire amount not being shown by the evidence. One instalment of that loan, amounting to $525, fell due in the year 1896, and should have been collected in the tax roll of that year. The secretary of state certified this sum to the county clerk as due, and to be collected of the village, with its proportion of state taxes. The county board, in its equalization of taxable property of the county for the year 1896, made a separate valuation of the village and the town property, and described the same as follows: "That part of the town of Milwaukee not included in the village of Whitefish Bay, $1,576,564," and "that part of the town of Milwau-

kee included in the village of Whitefish Bay, $187,500." The county clerk apportioned the state and county taxes in due proportion against these two valuations, and added the sum of $525 to the item covering the village property, and the apportionment was approved. The county clerk, however, certified no taxes to the village clerk, but sent both apportionments to the town clerk of the town of *Milwaukee,* manifestly on the theory that there was no legal village of Whitefish Bay, on account of a decision of this court (*In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033), which case was decided June 24, 1896, and in which it was held that the general law under which the village was incorporated was unconstitutional. The town clerk of the plaintiff town neglected to collect that part of the taxes apportioned against the village, and only collected and returned the amount apportioned against the town outside of the village; hence there were no state or county taxes collected in that year in the village of Whitefish Bay. In the year 1897 the state and county taxes were apportioned to the village in the same manner as they had been prior to the year 1896, and the said sum of $525 was also certified and collected from the village. In addition thereto the county board relevied upon the town the unpaid state and county taxes for the year 1896, together with the $525 in addition to the regular taxes for 1897, and the same were collected and paid by the town. Thus the sum of $525 has been twice collected, and the county has remitted to the state only the sum of $525, and consequently still retains the last sum, and for the recovery thereof this action is brought.

Upon these facts the court rendered judgment that the plaintiff recover said sum, with interest, and the county appeals.

For the appellant there was a brief by *W. H. Bennett,* district attorney, and *F. E. McGovern,* assistant district attorney, and oral argument by *Mr. McGovern.* To the point

that, even if the county officers were in error in apportioning and levying these taxes, the town, having voluntarily paid them with full knowledge of the facts, cannot now recover, they cited *Milwaukee v. Whitefish Bay,* 106 Wis. 25–29; *Powell v. St. Croix Co.* 46 Wis. 210; *Parcher v. Marathon Co.* 52 Wis. 337; *Harrison v. Milwaukee,* 49 Wis. 247, 252; *Custin v. Viroqua,* 67 Wis. 314; *Deuster v. Mittag,* 105 Wis. 459; *Raipe v. Gorrell,* 105 Wis. 636.

For the respondent there was a brief by *Timlin, Glicksman & Conway,* and oral argument by *Nathan Glicksman.*

WINSLOW, J. This case seems to be governed by very plain and well-understood principles of law. The organization known as the "Village of Whitefish Bay" borrowed of the state $525. The town of *Milwaukee* did not borrow this sum, nor become liable for its repayment. The county, as the agent of the state, collected this sum twice,—once from the debtor, and once from the town. It has fully paid the state, and still has $525 in its treasury which belongs neither to it nor to the state. To whom does it belong? Plainly to the town. Some confusion seems to have arisen in the minds of the legal advisers of the county (1) because the so-called village of Whitefish Bay in 1896 had not legally become an independent municipality for the purposes of collecting taxes under the provisions of ch. 341, Laws of 1889; and (2) because the law under which the village was organized had been declared unconstitutional by this court, and hence it was not even a *de facto* village. Neither fact cuts any material figure in the case.

Whether taxes are collected by village officers independently, or through the agency of town officers, does not affect the liability of the village to discharge its proper tax burdens and meet its legal obligations. It constitutes simply a difference in the procedure by which the taxes are collected,

and does not make the town liable to discharge the debts of the village.

While the village was not even a *de facto* village, because the law under which it was organized was unconstitutional, still it was made a village by ch. 5, Laws of 1897, and thereby charged with the obligation incurred by the previously existing voluntary organization to which it succeeded. *Winneconne v. Winneconne,* 111 Wis 10, 86 N. W. 589; *S. C.* 111 Wis. 13, 86 N. W. 590. This act was approved and went into effect February 23, 1897, and the debt then became the debt of the legally incorporated village of Whitefish Bay, even conceding that it never was such before. The county then proceeded to collect it twice,—once from the village, which owed it, and once from the town, which did not owe it, and has been enriched by the sum of $525 by the operation. Upon the plainest principles of justice, it is liable to refund the amount which it has been so enriched, and which does not belong to it. Nor does the fact that the county in the year 1897 charged back this sum against the town as delinquent, together with the uncollected state and county taxes of 1896, affect the question. The debt was still primarily the debt of the village alone, and, when in fact paid by the village, the town becomes entitled to a return of its money.

By the Court.—Judgment affirmed.

WINTER, Respondent, vs. GREILING, Appellant.

April 22—May 13, 1902.

Services of mother-in-law: Implied contract: Presumption as to gratuitous service.

Plaintiff, who lived in her own home and supported herself by washing and house-cleaning for others, had, on several days in each week for a number of years, performed such work for de-

fendant, her son-in-law, at his home and at her own residence, with his approval, but without any express agreement either that such services should be paid for or that they should be gratuitous. Defendant had rendered her some occasional favors in the transaction of her business. *Held*, that a contract to pay for plaintiff's services would be implied, the facts being insufficient to raise a presumption that they were gratuitous.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This is an action to recover the value of services. The action was commenced December 12, 1899, and the complaint alleges that from December 13, 1893, to October, 1898, the plaintiff worked for the defendant doing washing, laundry work, and cleaning, for a time amounting to 993 days, and that such services were reasonably worth the sum of $1 per day. The answer admits that the plaintiff rendered some services for the defendant of the character claimed, but denies the amount claimed by the plaintiff, and alleges that the services were rendered gratuitously, the plaintiff being the mother-in-law of the defendant.

The action was referred to the Honorable G. W. Hazelton, to hear, try, and determine. Among the facts which were undisputed were the following: That the plaintiff was the mother-in-law of the defendant, and that at the time of the trial she was sixty-eight years of age, and had for many years supported herself at manual labor, such as laundry work and cleaning; that the plaintiff's daughter and the defendant were married in the year 1882, and that for two years thereafter the plaintiff lived with them, but that since that time she had lived with a son in a home of her own, about two blocks distant from the defendant's residence, and had supported herself; that the defendant during all the time in question in this action kept a saloon in the lower part of his house, and lived upstairs; that his family consisted of his wife and four children, the oldest of whom was seven-

teen years of age at the time of the trial; that the defendant employed no servant during all of the time, and that the housework was all done by the defendant's wife, with the assistance of the plaintiff.

The plaintiff's evidence tended to show that since the year 1882, and up to October, 1898, the plaintiff had worked for the defendant, in doing washing, scrubbing, and cleaning house, four days of each week; that she did the same kind of work for pay for others; that she had kept no memorandum or account of her work; and that it had never been paid for, although she had asked for payment.

The defendant admitted that the plaintiff had done work of the kind claimed at his residence and saloon, but claimed that it did not amount to more than one day a week; that the plaintiff had never asked for any pay; and that he had helped the plaintiff by giving her clothing, vinegar, and brandy, and had also helped her in her business, by advancing her money occasionally to pay her taxes, as well as the interest upon a mortgage, some of which sums had not been repaid; but he was unable to say how much had not been repaid.

At the close of the trial the referee found that from December 13, 1893, to October 1, 1898, the plaintiff resided in a home of her own, wholly separate and apart from the defendant's home, and that during that period she labored for the defendant, with his approval, at his home, in the city of Milwaukee, and at her own residence, and that the number of days during which she so labored was 993, and that such labor was worth the sum of $1 per day; that no part of the same had been paid for; and that no agreement was made between the parties whereby such labor was to be rendered gratuitously, or in consideration of benefits or services done for her by the defendant. As matter of law, the referee concluded that the plaintiff was entitled to judgment against

the defendant for the sum of $993, with interest from the date of the commencement of the action and costs.

The findings of the referee were approved and confirmed by the circuit court, and judgment rendered for the plaintiff accordingly, and from said judgment the defendant appeals.

The cause was submitted for the appellant on the brief of *Christian Doerfler,* and for the respondent on that of *Samuel M. Field* and *W. O. Thomas.*

WINSLOW, J. We find ample evidence in the record to sustain the findings of fact of the trial court; hence the only question for serious consideration is whether those findings and the undisputed facts sustain the judgment. It is claimed by the appellant that the facts bring the case within the cases which hold that no contract will be implied to pay for services rendered by one member of a family to another, but that such services are presumed to be gratuitous, and that an express contract to pay for the same must be proven, in order to justify a recovery. The question as to when such a presumption will arise was so recently reviewed by this court in the case of *Williams v. Williams, ante,* p. 79, 89 N. W. 835, that it is not deemed necessary to enlarge upon it here. It is not possible to state an exact rule which can be applied to every case, but the principles stated in that case are believed to be substantially accurate and in accordance with the decisions.

Applying those principles here, we are inclined to agree with the referee and the trial court that in the present case the facts proven are not sufficient to raise the presumption that the plaintiff's services were rendered gratuitously and as acts of kindness, merely. The plaintiff was living in her own house, and providing for her own support by hard and continuous labor. She did not live in defendant's household, nor eat at his table. While the defendant apparently rendered her some favors in the transaction of her business,

they were only such occasional and incidental helpful acts as would be natural for a business man to render cheerfully to his wife's mother, who was alone in the world and forced to earn her own living. Had he been furnishing her with her support, either wholly or in large part, the question would have been different, but he was not; nor was the plaintiff's condition one of dependence upon him. The plaintiff's services were laborious, valuable, continuously rendered, and in the line of her regular occupation, and manifestly prevented her from laboring for others for pay. They saved the defendant the expenditure of large sums of money for necessary help in the operation of his saloon and the maintenance of his family. It is but just that he should pay what they were worth.

By the Court.—Judgment affirmed.

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HERMAN, Assignee, Appellant, vs. SCHLESINGER, Respondent.

April 22—May 13, 1902.

Attorney and client: Employment by assignee: Privileged communications: Waiver: Depositions: Appeal: Immaterial errors: Accord and satisfaction: Consideration.

1. An attorney employed by a person acting in a representative capacity, such as an assignee for the benefit of creditors, stands for the assignee or other trustee and not for the beneficiaries, and sustains substantially the same relation to his client as he would if the representative character were absent. The successor of the assignee or other trustee, therefore, cannot waive the privilege of his predecessor in regard to communications made by the latter to the attorney while he was in office.
2. Where an attorney serves a client in his professional capacity in the making and the reduction to writing of an agreement between the client and a third person, the client does not, by procuring the attorney to sign as a subscribing witness, waive his privilege of secrecy in respect to confidential communications made during the preparation of the instrument.

3. Where an attorney's services in a transaction are rendered to several persons, confidential communications to him in regard thereto cannot properly be disclosed unless all join in consenting to such disclosure.
4. The privileged communication between attorney and client recognized by sec. 4076, Stats. 1898, extends only to those communications made by the latter to the former which are of a confidential character and are made for the purpose of enabling the attorney to serve the client, and to the legal advice given in respect to such communication, and does not extend to communications between the attorney and a third person in the transaction of the client's business.
5. A witness cannot be compelled to disclose communications made to his attorney which would be privileged were the attorney under examination as a witness, but such privilege does not extend so far as to warrant the court in excluding a question on cross-examination as to whether, in the preparation of a cause for trial, the party was interrogated as to his knowledge respecting the matters in controversy and the questions and answers thereto reduced to writing for the purpose of enabling the attorney to know what his client might be expected to testify to.
6. Under sec. 4090, Stats. 1898, depositions may be read in evidence only upon condition that they have been filed with the clerk of the court and the other party notified thereof before the commencement of the trial.
7. Errors in the reception or rejection of evidence in an equity case are not deemed prejudicial in the absence of reasonable ground to believe that if the improper evidence had not been considered, and the proper evidence rejected had been admitted and given due weight, the result might probably have been different.
8. Either the conveyance by a debtor of an absolute title to property held collaterally, or a waiver of his right to the benefit of the federal bankrupt laws, is a sufficient consideration to support a settlement of the indebtedness upon payment of a part only of the amount due.

APPEAL from a judgment of the circuit court for Milwaukee county: W. C. SILVERTHORN, Judge. *Affirmed.*

Action to set aside a release of indebtedness on the ground of fraud. The substance of the complaint is as follows: June 1, 1893, the Plankinton Bank, a banking corporation located in the city of Milwaukee, Wisconsin, was insolvent and made a voluntary assignment for the benefit of its cred-

itors to William Plankinton, who accepted the trust, entered upon the discharge thereof, and continued in office till July 18, 1899. He was then succeeded by Irving M. Bean, who acted as assignee till December 20, 1899, when he was succeeded by the plaintiff, *Henry Herman,* who has since been the assignee and brings this action as such. At the time of the assignment defendant was indebted to the assignor in the sum of $78,878.32 for principal and a further sum for interest thereon. On and prior to April 9, 1899, defendant represented to the assignee, William Plankinton, that he was not possessed of any property whatever out of which any part of his indebtedness could be collected, and that it was for the best interests of the creditors of the insolvent bank that his indebtedness to it, then aggregating for principal and interest more than $168,000, should be released in consideration of the payment by him to the assignee of $1,486, one half in sixty days and one half in eight months, and caused said assignee to make like representations to the circuit judge having judicial charge of the assignment proceedings. Such representations were false and fraudulent and were made to the assignee and caused to be repeated to the said circuit judge for the purpose of obtaining a release of defendant's said indebtedness, for the trifling sum of $1,486, thereby cheating and defrauding those interested in the assigned estate. The circuit judge was misled, by said false and fraudulent representations, into making an order authorizing the assignee to accept from the defendant the sum of $1,486, one half in sixty days and one half in eight months, and in consideration thereof to release all his said indebtedness, and such authority was acted upon to its full extent. Defendant refuses to consent to a rescission of said fraudulent transaction or to accept a return to him of the $1,486 paid as aforesaid, or to respond to the assignee for the benefit of those interested in the assigned estate to the amount due from him as aforesaid, or any part thereof,

though he is amply able to do so. The complaint closed with a prayer for appropriate relief.

The answer put in issue all the allegations of the complaint in regard to wrongdoing on defendant's part. It admitted the making of the assignment, the succession of plaintiff as assignee, the existence of large indebtedness to the assignee at the time of said assignment, and its subsequent release in consideration of $1,486, as stated in the complaint; but alleged that all representations made to the assignee and repeated to the circuit judge, upon the faith of which the settlement was authorized and made, were true in point of fact. The answer further alleged that in March, 1899, defendant was indebted to various persons in sums aggregating about $3,000,000; that he entered into agreements for the settlement of substantially all his indebtedness not represented by assignees and receivers prior to the transaction in question, on the same basis as that accepted by the assignee of the Plankinton Bank; that after securing such agreements he acquainted such assignee therewith and offered to make a like settlement with him, stating, as the facts were, that he was insolvent, that he was indebted in the sum above indicated, that he had no property whatever out of which any part thereof could be collected, and that unless he was permitted to settle the same in the manner suggested he would take the benefit of the bankruptcy laws; that his offer was to pay the assignee, in consideration of a release of all his indebtedness to the assignee, and that of the firm of Schlesinger Bros., of which he was a member, and also that of Adolph Schlesinger, $1,486, and to convey to the assignee absolute title to some collateral held by the latter to secure the payment of said indebtedness; that upon due consideration, by such assignee and the circuit judge having judicial charge of the assignment proceedings, of the whole situation, including the opportunity

and right of defendant to take the benefit of the bankruptcy laws whereby his indebtedness to the estate might be wholly lost to it, the proposition for settlement was authorized by the circuit court, and was duly accepted and fully consummated.

The court decided the controverted issues and defensive matters pleaded, upon the evidence produced, in effect as follows:

(1) On or about April 1, 1899, defendant's indebtedness to the assignee of the Plankinton Bank, being still wholly unsettled, and amounting to $123,878 and interest, his total indebtedness to all his creditors being about $3,000,000, and he having already secured agreements for settlements covering a large part thereof for one and one fifth per cent. of the amounts due to his creditors respectively, he proposed to pay, for a release of all his indebtedness to such assignee, $743 in sixty days and a like sum in eight months, with interest thereon at six per cent. per annum, that being substantially the basis of settlement agreed upon with other creditors, and to release to such assignee all collaterals in his hands, held to secure the payment of such indebtedness, and at the same time satisfied such assignee that he was insolvent, that he was indebted in the sum of about $3,000,000, that he was unable to pay any substantial part thereof, and that if the offer of settlement was not accepted he would take the benefit of the federal bankruptcy laws.

(2) April 7th, the assignee, by a written petition for judicial advice, submitted the offer of settlement to the circuit judge, accompanied by a statement, that he had made diligent effort to collect the indebtedness owing him by defendant; that he had been unable to collect any part thereof; that neither the defendant nor the firm of Schlesinger Bros., nor any member thereof, possessed any property available for the payment of their liabilities; that their debts exceeded $3,000,000; that many of their principal creditors

had agreed to submit to a settlement of their claims, not more favorable than that offered to him; and that unless such offer was accepted there was a probability that the debtors would take the benefit of the bankruptcy laws, in which case no part of their said indebtedness would be realized. In response to such petition an order was entered by the court authorizing the assignee to accept such offer of settlement, whereupon a contract of settlement was made between him and the defendant, embodying the terms thereof.

(3) The sum stipulated to be paid to the assignee was paid in due time and the contract of settlement was fully carried out upon both sides.

(4) At the time said settlement was made defendant was insolvent, his indebtedness amounted to some $3,000,000, and neither he nor any other person liable for the released indebtedness had any property out of which any part thereof could be collected.

(5) No false statements were made by defendant to secure the settlement, and in view of all the circumstances it was just to those interested in the assigned estate.

Upon such findings judgment was ordered dismissing the complaint with costs, and was entered accordingly.

M. M. Riley, Moritz Wittig, and *J. B. Doe,* for the appellant.

For the respondent there were briefs by *Ryan, Ogden & Bottum,* and oral argument by *Hugh Ryan.*

MARSHALL, J. Fifty-three assignments of error are presented for consideration. The appeal does not seem to call for a discussion of them in detail. None of them has been overlooked. Such will receive special attention in this opinion as are deemed of sufficient importance to merit it.

1. Assignments of error 1 to 6, inclusive, relate to rulings upon the trial sustaining claims of privilege made by Mr. James G. Flanders, from testifying to matters in respect to

which he was interrogated, upon the ground that whatever knowledge he had on the subjects was acquired in his professional employment by the parties to the transactions. The exceptions to such rulings present for consideration several propositions:

(a) Can the successor of a person acting in a representative capacity, such as an assignee, waive the privilege of his predecessor as to secrecy in regard to communications made by the latter to his attorney while he was in office? The attorney for an assignee, administrator, or other person similarly situated, is his private employee. At law the attorney must look to such person for his pay, and the latter must rely for reimbursement for his outlay in that regard upon the allowance of his account by the court having judicial charge of the matter. The attorney does not, as counsel for appellant seem to think, stand for the beneficiaries of the trust. He stands for the trustee. He is the latter's personal representative. The trust estate is not directly chargeable with the attorney's claim for compensation. The professional relation existing between him and the trustee is substantially the same as it would be if the representative character of the latter were absent. *Miller v. Tracy,* 86 Wis. 330, 333, 56 N. W. 866; *Thomas v. Moore,* 52 Ohio St. 200, 39 N. E. 803; *Platt v. Platt,* 105 N. Y. 488, 501, 12 N. E. 22. Upon the trustee going out of office and being succeeded by another, there is no devolution of the liability of the former upon the latter for the expenses of the former's attorney. The outgoing trustee must account to his successor, or as the court may direct. His attorney and his successor do not, by reason of the succession, enter into the relation of attorney and client as to past transactions or any other. It follows as a matter of course that the new trustee has no better right than a stranger to represent his predecessor as to waiving the latter's right to

have his former professional employee remain silent as to matters communicated to him under the veil of privilege.

(b) Does a person, by procuring his attorney to sign, as a subscribing witness, an instrument evidencing an agreement or transaction between such person and a third party, in the making of which and reduction thereof to writing such attorney served such person in his professional capacity, waive the common-law privilege declared by sec. 4076, Stats. 1898, in respect to the transaction? Counsel point with much confidence to several authorities to support the affirmative of that proposition, but we are unable to discover any good ground for such confidence. *Doheny v. Lacy,* 168 N. Y. 213, 61 N. E. 255, is one of counsel's supposed supports. There the ruling that the privilege of secrecy was waived was not put on the ground, merely, that the attorney signed the instrument as a subscribing witness, but on the ground that the communications between attorney and client were not of a confidential character, as shown by the circumstance that they were made openly in the presence of third persons. No intimation appears in the opinion of the court that a mere witnessing of an instrument, of itself, will raise the veil of secrecy between attorney and client in respect to legal advice of attorney to client or communications by the latter to the former to secure such advice. It is suggested that if an attorney acts as such in the preparation of an instrument for both parties thereto, no other person having knowledge of the transaction, each of the parties is entitled to enforce the privilege of secrecy as to disclosures for the benefit of third persons, but not as relates to matters between themselves. Further, that the mere calling of an attorney to witness the execution of an instrument does not close his mouth as to what he sees and hears in regard to the matter to which he thereby becomes, in a sense, a party. *Coveney v. Tannahill,* 1 Hill, 33, 40. That is upon the ground that the relation of attorney and

client is not involved in such a transaction. Counsel cite 1 Greenl. Ev. § 244. That is only to the effect that if an attorney, employed to prepare an instrument, when his labor in that regard is concluded, assumes the character of a subscribing witness to the paper at the request of his client, such circumstance will waive the privilege of secrecy as to what a subscribing witness may be called to prove as such, but not as to confidential communications made during the preparation of the instrument. The text is supported by *In re Will of Coleman,* 111 N. Y. 220, 226, 19 N. E. 71, where it was held that if a testator procures the attorney who prepares his will to witness the execution thereof, he impliedly waives the privilege of secrecy between attorney and client as to those matters which such a witness is expected to testify to after the death of the testator in order that the will may be effective. But it was said that the veil of secrecy is not thereby lifted so as to permit the attorney to disclose communications made to him in the course of the preparation of the will in order to enable him to reduce the wishes of the testator to writing. That is elementary. Authority to the same effect may be found in the reported decisions of this court. *McMaster v. Scriven,* 85 Wis. 162, 168, 55 N. W. 149.

The extent to which the authority goes is clearly indicated by the following language used by Mr. Justice PINNEY in the last case cited, speaking of the circumstance of the attorney acting as a subscribing witness to the will prepared by him: "This must be held to be a waiver of objection to his competency, so as to leave the witness free to perform the duties of the position." The privilege of secrecy between attorney and client is grounded in the idea that communications made by the latter to the former are of a confidential nature and must necessarily be such in order to enable the attorney to properly serve his client. The rule does not extend further than the reason thereof. Keeping that in

mind it is easy to see that none of the authorities cited by counsel is in their favor under the facts of this case. The attorney whose testimony was desired here was not merely called in to act as a subscribing witness to the instrument. The testimony had no relation to the mere execution of the paper. It did not relate to matters which occurred publicly, nor was the disclosure sought as between two persons for both of whom the attorney acted in the preparation of the paper. *Britton v. Lorenz,* 45 N. Y. 51; *Hurlburt v. Hurlburt,* 128 N. Y. 420, 28 N. E. 651. Here was the ordinary case of an attorney employed as a confidential adviser in the preparation of an instrument to which he became a subscribing witness, and subsequently, in an action between other parties, he was called as a witness and requested to make disclosures in respect to the matter. He testified freely to the circumstance of his witnessing the execution of the paper, but insisted upon his client's privilege of secrecy as to matters which came to his knowledge from his client in the preparation of the paper. From what has been said it seems clear that the court properly sustained the claim of privilege.

(c). If an attorney acts in his professional capacity for two persons, does the circumstance that one of them waives the privilege of secrecy affect such privilege as to the other? It seems that Mr. Flanders performed services for the defendant and his wife. He was asked, as a witness, to disclose matters in respect thereto which came to him under the veil of secrecy as between attorney and client. The privilege was waived as to defendant, but the attorney, deeming himself in duty bound to assert that of Mrs. Schlesinger, acted accordingly, and he was sustained by the court. What has been said indicates that the ruling was right. When an attorney's services in a transaction are rendered to several persons, confidential communications to him in regard thereto, in which all such persons are interested, cannot be

properly disclosed unless all join in consenting thereto. The rule in that regard has been carried so far as to preclude an attorney from divulging matters confidentially communicated to him by a firm without the individual consent of every member thereof. *People v. Barker,* 56 Ill. 299. The reason for that is obvious. The privilege of secrecy is purely a personal right. When it affects several persons there is no way by which all can be protected in respect thereto other than by holding that all must join in lifting the veil of silence, or it must remain a secure cover for those things which it would obscure if they related to a single person only.

(d) If a person employs an attorney to act in his professional capacity in a transaction between such person and another, is such attorney privileged from disclosing the communications which pass between him and such other in regard to such employment? Counsel for appellant do not discuss this branch of the case exactly as it appears in the record. One would suppose from what is said in regard thereto in counsel's brief, that the attorney acted in the matter, in respect to which he was interrogated, as a mere agent. He testified to the contrary most distinctly, over and over again, saying that he was not an agent at the time of and in the transaction in question, in any sense whatever, but that he acted in the performance of his duty as a legal adviser to his clients. On that testimony, in part, the trial court acted in deciding the question of competency; so whether the ruling of the court was right is involved in a decision of the proposition we have stated. The privilege of secrecy, as to transactions between attorney and client, is limited by the statute to communications made by the latter to the former, and to the former's advice thereon, in the course of his professional employment. We are unable to see how communications between an attorney and a person not his client, while conducting a business matter with such

person for his client, whether he is acting professionally at the time or not, can be classed with those named in the statute. A communication made by a person to his attorney to be and in fact communicated by him to another, is not privileged, because, in the very nature of things, it is not confidential in character. The very purpose thereof is to have the communication repeated to one who is under no obligation not to divulge it. *Henderson v. Terry,* 62 Tex. 281. That being the case, manifestly a reply to such a communication must be governed by the same rule, and so must also other communications between the attorney and the third person in case of negotiations between the two.

It was claimed on the trial that the statutory privilege of secrecy includes all communications made to the attorney by reason of his professional employment, whether by his client or by third persons while he is in pursuit of his client's business, and also to all knowledge obtained by him, whether from his client or otherwise, while in pursuit of the latter's business; and the court so ruled, excluding evidence of negotiations conducted for the defendant and his wife with third persons in respect to a matter material to the issues of the case. Manifestly, the language of the statute does not justify such ruling. Communications made to an attorney by a person while the attorney is dealing with such person as agent, merely, or agent and attorney, or attorney and counselor, of another, are in no sense communications made by the latter to such attorney, of a confidential character or otherwise. Neither the letter nor the spirit of the statute, nor any decision made under it or any similar statute or the common law, of which the statute is merely declaratory, goes to that extent, so far as we are advised. In *Koeber v. Somers,* 108 Wis. 497, 84 N. W. 991, this court, speaking by Mr. Justice Dodge, held that the privilege of secrecy as between attorney and client, recognized by the statute, extends only to those communications made by the

latter to the former which are of a confidential character and made for the purpose of enabling the attorney to serve his client, and the legal advice given to the client in response to such communications; that when the attorney goes forth to perform a service for his client, with a third person, communications between such third person and the attorney are not within the privilege of secrecy. However, we are unable to perceive that the erroneous ruling of the court was prejudicial to appellant. The transactions which the attorney was requested to disclose, and substantially all the details thereof, were, either directly or by reasonable inference, established on the trial.

2. Assignments of error 13 and 14 relate to a ruling excusing respondent from answering on cross-examination as to whether, in the preparation of the case for trial, he was not examined by his attorneys and his testimony to be given upon the stand reduced to questions and answers, upon the ground that he was privileged from answering under the rule allowing secrecy as between attorney and client. The circuit court seems to have supposed that such privilege extended to everything that occurred between respondent and his attorney respecting the subject of the business of the professional employment. That is wrong. On the other hand counsel for appellant seem to have the idea that, while respondent was privileged to have his attorney not make disclosures respecting certain confidential communications between them, without his permission, the way was open to compel him, as a witness, to make such disclosures. That is wrong. Professional services of attorneys are essential to the orderly and efficient administration of justice, and, as a rule, to the safe conduct of legal business of any kind. Secrecy as to communications between attorney and client, to a certain extent, is required in order to properly effectuate the purpose of the relation between the two. The foundation principle of the rule in that regard suggests, on a moment's reflection, that

what the attorney ought not to disclose without his client's permission, the latter ought not to be compelled to disclose. The law is in harmony therewith. It makes the client complete master of the situation, if his attorney properly performs his duty. *Hemenway v. Smith,* 28 Vt. 701; *Barker v. Kuhn,* 38 Iowa, 392; *Duttenhofer v. State,* 34 Ohio St. 91; 1 Whart. Ev. § 583; Steph. Dig. Ev. art. 115. However, the rule extends only to the communications mentioned in sec. 4076, Stats. 1898, not to a mere statement as to whether, in the preparation of a cause for trial, a party was interrogated as to his knowledge respecting the matters involved, and the questions and answers thereto reduced to writing, enabling the attorney to know what his client might be expected to testify to. The evidence rejected should have been allowed. It had some bearing on the credibility of respondent's evidence. It was not admissible for any other purpose. But we are satisfied that the mere fact, if it be a fact, that respondent was carefully interrogated by his counsel before going upon the stand, the questions propounded and the witness's answers being reduced to writing, would not have affected the result of the trial, if proof thereof had been permitted. The cause turned on facts, of the existence of which the court was evidently satisfied quite independently of any testimony by respondent.

3. Errors 20 to 23, inclusive, relate to refusals by the court to permit the use in evidence of a deposition taken and filed during the progress of the trial. That ruling was in strict accord with the statute, which allows the reading of a deposition in evidence only upon condition that it shall have been filed with the clerk of the court and the other party notified thereof before the commencement of the trial. Sec. 4090, Stats. 1898.

4. A considerable number of assignments of error relate to the admission of evidence over objections by counsel for appellant, and to the rejection of evidence offered by them

upon objections made by respondent, and others to refusals by the court to compel the production of books and papers for use upon the trial or for inspection by appellant's counsel in aid of the presentation of appellant's case or of discrediting that of respondent. Much time might be spent in discussing such assignments of error in detail, but it seems neither necessary nor advisable to do so. Errors in the reception or rejection of evidence in an equity case are not deemed prejudicial in the absence of reasonable ground to believe that if the improper evidence had not been considered, and the proper evidence rejected had been admitted and given due weight, the result might probably have been different. *Kirkland v. Telling,* 49 Wis. 634, 6 N. W. 361. Under that rule it is considered that the errors alleged, to which this paragraph is devoted, regardless of whether they are well assigned or not, were not prejudicial to the rights of appellant. If all the evidence admitted over objection had been rejected, and all the evidence offered by appellant's counsel which was rejected had been received and had shown all that counsel for appellant suggest would or might have been shown thereby, the findings of the court on matters of fact, in all reasonable probability, would not have been different than those we find in the record. Still the situation would have remained unaffected—which the trial court undoubtedly believed was the real truth of the matter,—that all the property claimed by appellant to have belonged to respondent and claimed by him to have been the property of his wife, in the latter part of 1894—consisting of the capital stock of a corporation located in Mexico called the Concheno Company—long prior to the settlement challenged and when it was perfectly proper for respondent or his wife, whoever was the owner thereof, to sell it, was conveyed, one half to Corrigan, Ives & Co., and the other half to Henry Stern, the father of respondent's wife, in payment of indebtedness owing to them by respondent; that subsequently Stern ex-

changed his stock with Corrigan, McKinney & Co., for property which he subsequently, and long before the settlement in question, gave to his daughter subject to a claim thereon for $23,000, and that the same became the original assets of the Dunn Iron Mining Company, the stock of which was the property of Mrs. Schlesinger by the same right as she took title to such assets from her father; that later the Dunn Iron Mining Company, without any change in the ownership of the stock and without the use of any capital other than that originally invested therein and the increase thereof, acquired other mining interests, the property, in the whole, constituting that regarded by appellant's counsel as the property of respondent at the time of the settlement complained of, with Plankinton, assignee. In that view, clearly, there was no admission or rejection of evidence which, by any reasonable stretch of the imagination, can be said to have probably prejudiced appellant. If Stern acquired, legitimately, ownership of one half of the stock of the Concheno mine—and the trial court in effect so found—it is immaterial, so far as relates to ultimate facts, whether the stock of the initial corporation formed in Milwaukee, called the Standard Metal Company, the records of which appellant's counsel sought to have produced in evidence and failed, of which complaint is made, or the stock of the Concheno mine, into which the property of the Standard Metal Company was merged, was property of respondent or that of his wife. In that view, also, it was entirely immaterial to the issues of this case, what the value of the property was, possessed by respondent's wife at the time of the settlement. So, failure of opportunity to make proof thereof to the satisfaction of appellant, by reason of the adverse rulings of the court of which complaint is made, was nonprejudicial.

5. The other assignments of error touching matters within the issues made by the pleadings, meriting attention, relate to whether the findings of fact are supported by the evidence.

That question turns, mainly, on whether the property derived from the transfer by Stern to his daughter, as before stated, belonged to her or to respondent at the time of the settlement in question. If it belonged to the latter, then he possessed, at the time of such settlement, a fortune out of which he might have paid a large proportion, if not all, of the indebtedness to Plankinton, assignee, and he perpetrated a fraud upon such assignee and thereby wrongfully secured the settlement complained of. If the transfer by Stern to Mrs. Schlesinger was a legitimate transaction, then the evidence does not show that the representations, by means of which the settlement with the assignee was secured, were untrue. The trial court, as before indicated, found in favor of respondent on that subject. It would not follow that such decision is wrong if we were to determine that the stock of the Standard Metal Company, through which it is claimed respondent commenced to do business after his failure in 1893, was his property, and that the stock of the Concheno mine belonged to him when the same was turned out in payment of his indebtedness to Corrigan, Ives & Co. and to Stern. The precise manner in which the trial court reached the conclusions on matters of fact does not appear. We should hesitate on the record before us to disturb the judgment if the turning question were whether the stock of the Standard Metal Company, and that of the Concheno mine, belonged to respondent. Viewing the decision as resting solely on whether the property given by Stern to Mrs. Schlesinger was his to bestow in that way, the creditors of respondent having at the time of such bestowal no right thereto, there is far too much evidence in the record to sustain it to warrant us in coming to the conclusion that it is against the clear preponderance of the evidence. It would take much time to go through the record in detail in an attempt to thoroughly discuss the evidence and thereby justify the trial court's findings. It is not customary to do that in a case like this

where a conclusion is reached that the judgment must be affirmed. Such a discussion really serves no purpose except to satisfy counsel for the losing party that the evidence has been carefully considered in all its bearings. The preservation of such discussions in the printed records is not helpful, and it is believed that, as a rule, the better course is to omit them. Ordinarily counsel for the losing party, who have sufficient confidence in their case to take the chances of an appeal to this court on mere questions of fact, are no better satisfied that they are wrong, and not the trial court, or, at best, satisfied that from the standpoint of the reviewing court, having only the record before it, it cannot be said that the findings of the trial court are against the clear preponderance of the evidence, after reading a laborious discussion upon appeal in justification of the conclusion there reached, than they were before. The appearance of a decision, particularly as to mere matters of fact, depends largely upon the standpoint from which the view is taken. From that of partisanship occupied by the interested attorney, it looks far different than from that of a court. He who looks from the former position is bent on securing a favorable result for his client. In that situation the faculties brought into use in searching for truth for the sake of truth are not necessarily active. He who views a decision from the nonpartisan, nonprejudiced standpoint of the court is moved only by a desire to discover the right, regardless of effects and consequences which cannot be avoided and the right prevail. From the latter position we have carefully examined the evidence in this case. Counsel must take that assurance in lieu of an extended discussion of the evidence. The result of our labor is that we are unable to find justification for disturbing the findings of the court.

6. The question is presented, somewhat outside the cause of action set forth in the complaint, of whether the settlement complained of is void for want of consideration. Coun-

sel for respondent make no objection to the proposition being considered, and we will not suggest any that might have been put forward if such exist. It is elementary that the mere acceptance, by a single creditor, of a part of an undisputed claim in settlement of the whole, does not preclude a subsequent, legitimate demand for the balance thereof. *Continental Nat. Bank v. McGeoch,* 92 Wis. 286, 310, 66 N. W. 606; *Otto v. Klauber,* 23 Wis. 471; *Lathrop v. Knapp,* 27 Wis. 214, 225; *Davenport v. First Cong. Society,* 33 Wis. 387, 391; *Lerdall v. Charter Oak L. Ins. Co.* 51 Wis. 426, 429, 8 N. W. 280. It is also elementary that where a creditor obtains some advantage, or promise thereof, that may possibly be realized in addition to the part payment by the debtor, for a release of the latter's indebtedness, there is a good accord and satisfaction, effectually extinguishing the same, regardless of how small the amount actually paid upon it may be. *Continental Nat. Bank v. McGeoch, supra.* Applying that to this case, the settlement in controversy cannot be impeached for want of consideration. The contract of settlement was obviously drawn with care, having in mind the legal essentials thereof in order to preclude any subsequent claim against respondent for any further sum upon the indebtedness. Absolute title to property held by the assignee as security only, was conveyed to him, and the right of respondent to the benefit of the federal bankruptcy laws was waived in the former's favor. There was some advantage involved in those concessions. Absolute ownership of the collateral in place of a holding thereof as security was of itself an advantage. Admit that it was of slight, almost trifling character, yet it must be held to have been sufficient to make a good accord and satisfaction. Independently of authority, it would seem that the giving up of the valuable right of respondent to the benefit of the federal bankruptcy laws was a substantial consideration and sufficient to support the settlement. Counsel for respondent cite us to *Hinckley v.*

Arey, 27 Me. 362, where it was so decided. The rigorous rule of the common law, permitting a person to receive part of an undisputed, presently due indebtedness, pretending to accept the same in satisfaction of the whole indebtedness, the debtor parting with the amount paid with that understanding, and then change front and sue for the balance of such indebtedness on the ground that the release thereof was void for want of consideration, is so little favored by courts that it is commonly held not to apply where anything, whether of advantage to the creditor or disadvantage to the debtor, can be reasonably said to stand for that part of the indebtedness not measured by an equivalent in money actually paid to the creditor. The common-law rule has been abolished by statute in Alabama, Georgia, Maine, North Carolina, Tennessee and Virginia, and perhaps some other states. In Connecticut it has not been recognized by the courts. *Ford v. Hubinger,* 64 Conn. 129, 29 Atl. 129. In the other states where no statute exists to the contrary, it is believed the rule is adhered to in form, but there is apparently a progressive disposition to disregard it in spirit. It is said that there is sufficient consideration moving with the part payment to release an indebtedness to take the transaction out of the common-law rule, if the debtor does anything which he is not bound by law to do, or omits to do anything which he has a right to do, to the advantage, in any appreciable degree, of the creditor, or the disadvantage of himself; that the consideration, in addition to money paid, "may consist of anything which might be a burden to the one party or benefit to the other." *Watson v. Elliott,* 57 N. H. 511; *Jaffray v. Davis,* 124 N. Y. 164, 26 N. E. 351; *Maddux v. Bevan,* 39 Md. 485.

Nothing further, it seems, need be said in disposing of this case.

By the Court.—The judgment appealed from is affirmed.

THE STATE EX REL. HEIM, Appellant, vs. WILLIAMS, Respondent.

April 23—May 13, 1902.

Quo warranto: ***Action by private person: Judge of superior court: Elections.***

1. **Where the attorney general has refused to bring an action of *quo warranto* to try title to an office, a private person cannot maintain the action on his own complaint, under sec. 3466, Stats. 1898, unless he is entitled to the office, since, under sec. 3463, the proceeding is a "civil action," and therefore, under sec. 2605, must be prosecuted in the name of the real party in interest.**
2. **Where there was no law authorizing an election for a certain office at an annual spring election, the fact that at that election a number of electors cast ballots for the relator for such office and he received a majority of the votes so cast, does not constitute an election of him to the office, even though there was a vacancy in the office and the legislature had failed in its constitutional duty to provide for an election to fill such vacancy.**
3. **A private relator who has no right to maintain an action to try title to an office is not aggrieved by a judgment adjudging the respondent entitled thereto.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

At the time of the regular spring election in April, 1897, George E. Sutherland was elected judge of the superior court of Milwaukee county for a full term of six years from the first Monday in May, 1897, under sec. 4, ch. 67, Laws of 1891, creating an additional superior judge of said court. He died in September, 1899. The governor appointed the respondent, *Orren T. Williams,* "judge of the superior court of Milwaukee county, *vice* George E. Sutherland, deceased, to execute and fulfill the duties of that trust for the residue of the term for which said Sutherland was elected, being the term of six years from the first Tuesday in May,

1897," under which appointment the respondent has exercised and is exercising the powers and privileges of that office. More than twenty days before the 3rd day of April, 1900,—the day for municipal and town elections through the state,—the relator demanded of the secretary of state, and also of the county clerk of Milwaukee county, that they give notice of an election for the office of judge of said court to fill the vacancy caused by the death of Sutherland. He also filed with the county clerk a nomination paper signed by the requisite number of electors of Milwaukee county, designating him as a candidate for that position at an election to be held on that day, and demanded that his name be placed on the official judicial ballots, and that other steps be taken necessary to the holding of an election for such an office. All such demands were refused. The fact of his candidacy was unofficially commented upon and communicated to the public through the medium of the public press of Milwaukee. On the 3rd day of April a large number of persons, stated in the relation at several thousand, cast votes for the relator for that office, constituting, as alleged, a majority of all the votes cast at said election for said office. The inspectors of election made return of 226 votes for him, and all others were returned uncounted as defective ballots. His demands for canvass of the votes and issue of a certificate of election were refused, but on the 2d day of May he filed in the office of the clerk of the circuit court for Milwaukee county his oath of office as judge of the superior court. By virtue of such facts the relator claimed title to said office, and, having demanded that the attorney general institute *quo warranto* against the sitting judge, and been refused, he brought this action in the name of the state of Wisconsin on his complaint in the circuit court for Milwaukee county, praying the ouster of *Williams* and judgment that the relator is entitled to the office and be admitted to the same. Answer being made by the defendant, the action came on for trial, and, except for

proof of the title of the defendant in accordance with the facts above stated, all evidence under the relation was excluded, and verdict directed for the defendant, and judgment dismissing the action and declaring defendant's title to the office good until May 1, 1903, was entered, from which the relator appeals.

H. L. Eaton, for the appellant.

For the respondent there was a brief by *Timlin, Glicksman & Conway, Geo. L. Williams,* and *A. H. Blatchley,* and oral argument by *W. H. Timlin.*

DODGE, J. The title of the respondent to the office he occupies is assailed on the ground that his appointment thereto by the governor, to hold for the residue of the unexpired term of his deceased predecessor, is invalid, for the reason that it, and the only act of legislature authorizing it, are prohibited by the provision of sec. 2, art. VII, of the constitution, requiring that:

"The legislature shall provide as well for the *election* of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts"

The act of legislature under which the governor acted in this appointment is sec. 1, ch. 24, Laws of 1889, providing that in case of vacancy in the office of judge of the superior court of Milwaukee county "the governor shall appoint a judge of said superior court, and the person so appointed shall hold for the residue . . . of the term." Hence the power of the legislature, if it has any, has been exercised to authorize the appointment in the present case. The question thus presented is an interesting one. It may not be easy to justify the appointment of a judge for substantially a whole term, or, indeed, for any part thereof longer than is

consistent with an orderly and convenient system of elections, in view of the express command of the constitution that such judges shall be elected by the people, unless, indeed, the constitution should be deemed to have received construction in the enactment of a similar statute with reference to county judges as early as ch. 60, Laws of 1859, the validity of which in this aspect has remained unquestioned ever since, its general validity having been affirmed in 1864 in *State ex rel. Finch v. Washburn,* 17 Wis. 658; the immediate question, however, not having been raised. It is, however, a cardinal rule of propriety with courts that they should not unnecessarily question or deny the constitutionality of an act of the legislature. Cooley, Const. Lim. (6th ed.), 196. In deference to this rule, we must dispose adversely of more than one of respondent's contentions which are preliminary to the question of his title, before we can properly inquire into the validity of the legislation on which that title rests. First among these is the right of the relator to maintain this action. Of course, if the respondent has no lawful title to the office of judge, the public generally may be interested in inquiring by what right he holds it, and in excluding him from its exercise. That was, and doubtless still is, the primary function of both the writ of *quo warranto* and of an information in the nature of *quo warranto* when the same is filed by public officers or in behalf of the public. But our statute has recognized or created an additional province for such a suit by providing (sec. 3466, Stats. 1898): "Such action may be brought in the name of the state by a private person on his own complaint when the attorney general refuses to act." Under that statute it has been provided (sec. 3463) that the proceeding is by "civil action," thus making it subject to sec. 2605: "Every action must be prosecuted in the name of the real party in interest;" or, to transpose the idea, that a party, in order to prosecute, must have a real interest in the object to be accomplished. *State ex rel. Peacock v. Orvis,* 20 Wis.

235; *State ex rel. Chase v. McKinney,* 25 Wis. 416; *State ex rel. Wood v. Baker,* 38 Wis. 71, 81; *State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 471, 487, 51 N. W. 724; *State ex rel. Glenn v. Stein,* 13 Neb. 529, 14 N. W. 481; *Att'y Gen. ex rel. Lawrence v. Trombly,* 89 Mich. 50, 58, 50 N. W. 744. The relator, though using the name of the state to sue, neither alleges nor claims any but a private interest. He does not assume to champion the rights of the public, which would be presented were the attorney general here present on behalf of the state, but predicates his right to sue wholly upon his title to the office. If he has not such title, then he has no interest in a judgment ousting the respondent from the office, save such as is common to all citizens or members of the community. That title is denied, and therefore becomes the first subject for inquiry and decision.

Relator's only claim to the office is based upon election thereto, claimed to result from the fact that certain electors of Milwaukee deposited in certain ballot boxes ballots designating him as their choice for the office in question, and that they exceeded in number those who cast ballots for any one else for that office. Under our form of government, an election, to have effect as declaring the will of the people, is a creature of law. Unless authorized by law as such, the ballots constitute merely voluntary expressions of individual opinions. It is true that, when an election is authorized at specified time and place, the votes then cast may bind the community, though the exact method of calling, noticing, or conducting the election may have been disobeyed (*State ex rel. Peacock v. Orvis,* 20 Wis. 235; *State ex rel. Bruce v. Davidson,* 32 Wis. 114, 120), but only when, in advance, the law has given such authority (*People ex rel. Fuller v. Palmer,* 91 Mich. 283, 288; *Brewer v. Davis* (Tenn.) 9 Humph. 208). Appellant has not succeeded in pointing out any provision of law authorizing an election for the office of judge of the superior court of Milwaukee county on April

3, 1900, nor have we found any. The constitution designates no time for holding any but the general elections on a specified day in November. The legislature has made provision for holding elections for various officers, including justices of the supreme courts and circuit judges, both for full terms and to fill vacancies, but none of such laws relate to the office in question, except sec. 4, ch. 67, Laws of 1891, which provides, "An additional judge shall be elected on the first Tuesday of April, A. D. 1891, and every six years thereafter," to wit, April, 1897, and April, 1903. If, under the constitutional requirement that it provide for the election of such judges, the duty is cast upon the legislature to provide for elections to fill vacancies, still that requirement is not self-executing. It does not fix a time. Neither does the failure of the legislature to obey transfer either the duty or power so imposed to the relator nor to any collection of electors. To summarize, therefore, there is no law authorizing an election for the office in dispute on the day when certain electors cast ballots for relator, and, however creditable such action as an expression of esteem and confidence from the individual voters, it cannot constitute an election of him by the people of Milwaukee county. Hence he has not shown that he has any title to the office now occupied by respondent, nor any interest to inquire by what right the latter holds it. The judgment dismissing the action is clearly correct, and that portion which adjudicates *Judge Williams's* title, whether correct or not, does not aggrieve appellant. We therefore need not consider any of the other preliminary questions, nor the power of the legislature to authorize appointment by the governor.

By the Court.—Judgment affirmed.

THE GLENDALE INVESTMENT ASSOCIATION, Appellant, vs. THE HARVEY LAND COMPANY, Respondent.

April 23—May 13, 1902.

Money had and received: Corporations: Officers: Wrongful deposit of moneys of another.

1. **An action for money had and received can be maintained only when the defendant has received money which in equity and good conscience he ought to pay to the plaintiff.**
2. **The secretary and treasurer of several corporations, including the plaintiff, the defendant, and the H. B. & L. association, having a check for $3,879.72 belonging to plaintiff, indorsed it in plaintiff's name and deposited it in a bank to the credit of defendant. Shortly afterwards he gave to the H. B. & L. association, on account of his individual indebtedness thereto, checks to the amount of $3,825, signed in defendant's name by himself as secretary, and such checks were paid. At the times mentioned defendant had on deposit, of other funds, only $22.39. No entry of the deposit or of the checks was made on defendant's books, and the transaction appeared only in its bank account. Defendant had no account with plaintiff, was not indebted to the secretary or to the H. B. & L. association, and did not learn of the deposit and checks until nearly a year after the transaction. *Held*, that plaintiff could recover from defendant, in an action for money had and received, only the $54.72 which remained of said deposit after payment of the checks mentioned.**

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This action was commenced April 25, 1899, to recover $3,879.72, money had and received. The complaint alleges, in effect, the corporate character of the plaintiff and defendant, and that January 19, 1898, the defendant had and received of the plaintiff, to the use of the plaintiff, the sum mentioned, which the plaintiff, on or about that date, loaned and advanced to the defendant; that the defendant was indebted to the plaintiff for the money so received by it, with interest from January 19, 1898; and that April 11, 1899,

the plaintiff demanded payment thereof from the defendant, but that the same has not been paid nor any part thereof.

The answer, in addition to admissions and denials, alleges, in effect, that January 19, 1898, the plaintiff, the defendant, the Mutual Building & Savings Association, and the Home Building & Loan Association were each and all Wisconsin corporations, doing business in Milwaukee, and that one John H. Myers was the secretary and treasurer of each and every of said corporations; that January 10, 1898, Myers, as secretary of the Mutual Building & Savings Association, drew and signed the check of that association, and caused the same to be signed by its president, on the National Exchange Bank, to the order of the plaintiff, for $3,879.72; that Myers thereupon took the check so signed, and January 18, 1898, indorsed thereon in blank the name of the plaintiff, as follows: *"The Glendale Investment Association,* by J. H. Myers, Secretary;" and thereafter, and without any knowledge of or authority from the defendant, deposited said check in the Wisconsin National Bank, in the defendant's bank account therein and to its credit, and thereupon, and immediately thereafter, Myers, to make good personal debts owing by himself to the Home Building & Loan Association, and without any knowledge of or authority from the defendant, drew four checks of the defendant, as secretary of the defendant, on the Wisconsin National Bank, against such deposit, in favor of the Home Building & Loan Association, for the following amounts, respectively, $475, $1,800, $650, and $900, making in all $3,825,—that is to say, $54.72 less than the amount of such deposit; that each and all of such four checks were paid by the Wisconsin National Bank out of said deposit; that at none of said times did the defendant have on deposit in the Wisconsin National Bank more than $22.39; that the defendant was not in any way indebted to the Home Building & Loan Association, nor to Myers, and had no account whatever with the plaintiff; that

the defendant had no knowledge of such deposit until long after the entire transaction had been completed; that the defendant never derived any benefit from such deposit, except that such balance of $54.72 appeared by the defendant's bank book to have remained to the credit of the defendant in the Wisconsin National Bank; that the transaction was in no sense the act of the defendant; that Myers converted to his own use the check of $3,879.72 of the Mutual Building & Savings Association to the order of the plaintiff on the National Exchange Bank, and, without the knowledge or consent of the defendant, passed the amount thereof through the bank account of the defendant for the sole purpose of disguising the transaction, and enabling him to make good certain of his debt or defalcation to the Home Building & Loan Association; and that in none of such transactions was Myers acting within the scope of his employment as secretary or treasurer of the defendant, but was acting as an individual, for the sole purpose of converting the money to his own use.

At the close of the trial the court refused to direct a verdict in favor of the plaintiff or submit the case to the jury, but directed a verdict in favor of the defendant. From the judgment entered upon the verdict so directed, dismissing the complaint upon the merits, and for $48.87 costs and disbursements, as taxed, the plaintiff appeals.

For the appellant there was a brief by *Timlin, Glicksman & Conway,* and oral argument by *W. H. Timlin.* To the point that the loss in this case ought to fall upon the defendant, they cited *White v. Morris* (Md.) 30 Atl. 642; *First Nat. Bank v. Dunbar,* 118 Ill. 625, 9 N. E. 186; *Thomas v. Arthurs,* 8 Kan. App. 126, 54 Pac. 694; *Harbach v. Colvin,* 73 Iowa, 638, 35 N. W. 663; *Pepper v. Cairns,* 133 Pa. St. 114, 7 L. R. A. 750; *Strong v. Ten Cent T. B. & L. Asso.* 189 Pa. St. 186, 42 Atl. 46; *Osborn v. Baird,* 45 Wis. 189; *Hare v. Bailey,* 73 Minn. 409, 76 N. W. 213; *St. Joe & M,*

F. M. Co. v. First Nat. Bank, 24 Colo. 537, 50 Pac. 1055, 1058.

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *Charles Quarles.* As to when an action for money had and received may be maintained, see *Travelers' Ins. Co. v. Mayor of Johnson,* 99 Fed. 663; *Moses v. MacFerlan,* 2 Burr. 1005; *Fishkill S. Inst. v. Nat. Bank,* 80 N. Y. 162; *Atlantic C. Mills v. Indian O. Mills,* 147 Mass. 268; Keener, Quasi-Contracts, 160; *Holden v. N. Y. & E. Bank,* 72 N. Y. 286, 287.

CASSODAY, C. J. It is undisputed that the check of $3,879.72, given by the Mutual Building & Savings Association, and payable to the order of the plaintiff, on the National Exchange Bank, January 10, 1898, was a genuine check, given on account of an existing indebtedness, and was the property of the plaintiff when received by Myers, and was paid in due course by the National Exchange Bank. It is also undisputed that it continued to be the property of the plaintiff up to January 18, 1898, when Myers, as secretary of the plaintiff, indorsed it in the plaintiff's name, and deposited the same in the Wisconsin National Bank to the credit of the defendant. It is also conceded that, during the balance of that month of January, Myers gave to the Home Building & Loan Association, on account of his own indebtedness, the four checks, each on the Wisconsin National Bank, mentioned in the answer, amounting in the aggregate to $3,825, and each signed in the name of the defendant by himself as secretary, and that such checks were all paid on or before February 1, 1898. It is conceded that at the time of such deposit the defendant had to its credit in the Wisconsin National Bank only $22.39, and that the amount of such deposit was not increased during the month of January, 1898. It is undisputed that Myers made no entry in the cash book, nor any other book of the defendant, of such de-

posit of $3,879.72, or any of the four checks mentioned, and that such deposit and such checks, had they related to a genuine transaction, should all have appeared on the defendant's cash book. They did appear in the defendant's bank account, but nowhere else. The defendant was not indebted to the Home Building & Loan Association in any way, nor to Myers, and had no account with the plaintiff. The defendant never learned of such deposit or checks until nearly a year after the transaction. Manifestly, Myers converted the $3,879.72 check to his own use, without any authority from the plaintiff, and then, to conceal such conversion and make the same effectual, he made the deposit and gave the four checks without the knowledge or consent or any authority from the defendant. In view of such undisputed facts, can the plaintiff recover the $3,825,—the aggregate amount which Myers so checked out of the bank on account of such deposit?

There is no pretense that there can be a recovery, except on the theory that the money was had and received by the defendant. There is no ground for claiming that the defendant had or received the money, except that Myers was the secretary and treasurer of the defendant as well as of the plaintiff, and that he deposited the same to the credit of the defendant, and then immediately checked out the amount mentioned, in payment of his own individual indebtedness to the Home Building & Loan Association. In other words, the defendant never in fact received nor had the benefit of any portion of the $3,825, and had no knowledge that the same had been so deposited and checked out until nearly a year after the transaction. As stated by Chief Justice DIXON, many years ago, an action for "money had and received, though legal in form, is in its nature an equitable remedy, and lies only where the defendant has received money which, *ex æquo et bono,* he ought to refund." *Fay v. Lovejoy,* 20 Wis. 406. "Such an action can only be maintained in a case

where the defendant has received money which in equity and good conscience he ought to pay to the plaintiff." *Blewett v. McRae,* 88 Wis. 280, 285, 60 N. W. 258. So, in a recent case, where the plaintiff in this case was defendant, Mr. Justice BARDEEN, speaking for this court, said: "The purpose of such an action is not to recover damages, but to make the party disgorge, and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." *Limited I. Asso. v. Glendale I. Asso.* 99 Wis. 59, 74 N. W. 633. See *Huganir v. Cotter,* 102 Wis. 323, 327, 78 N. W. 423; *Johnston v. Charles Abresch Co.* 109 Wis. 184, 185, 85 N. W. 348. For cases in other courts, see brief of counsel.

In the light of the admitted facts and these adjudications and many others which might be cited, can it be fairly said that the defendant ought, in equity and good conscience, to pay to the plaintiff the $3,825 which the plaintiff's secretary wrongfully converted to his own use in the manner indicated? We think not. The mere fact that Myers, as a subterfuge, wrongfully, and without authority, availed himself of the use of his office as secretary of the defendant to make such deposit and immediately check out the money for his own private use, did not, in equity and good conscience, make the defendant a recipient of that money. The transaction is essentially the same as if Myers had drawn the money on the $3,879.72 check, and then paid over to the Home Building & Loan Association for his own personal benefit $3,825, and deposited the balance of $54.72 to the credit of the defendant in the Wisconsin National Bank. The plaintiff contends that because the $54.72 remained to the credit of the defendant, and is still available to its use, the defendant thereby ratified the whole conduct of Myers in the transaction. It is obvious from what has been said that the defendant cannot be held liable, in this action for money had and received, for such money as it never did have or receive.

But, as to the $54.72 so to the credit of the defendant, we

perceive no good reason why the plaintiff cannot recover upon the principle of the cases cited. It is undisputed that the money was and is the property of the plaintiff. The defendant had possession of it in its bank account when the plaintiff demanded payment thereof, and has continued to retain such possession. The defendant has parted with nothing for it, and has no equitable right to it. In the language of Lord ELLENBOROUGH, C. J.: "An action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of another." *Hudson v. Robinson,* 4 Maule & S. 478; *Wells v. Am. Exp. Co.* 49 Wis. 230, 5 N. W. 333; *Jackson v. Jacksonport,* 56 Wis. 313, 14 N. W. 296. Of course, this language does not apply to a voluntary gift, but only to a case where the defendant has received money which, in equity and good conscience, he ought to pay to the plaintiff. It follows that the plaintiff is entitled to recover the $54.72, with interest from the time of such demand.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

DWIGHT BROS. PAPER COMPANY, Respondent, vs. WESTERN PAPER COMPANY, Appellant.

April 23—May 13, 1902.

Sale of chattels: Warranty: Breach: Evidence: Value.

1. Where there is an express warranty of quality of goods sold, there is no implied warranty of fitness for the special use intended, although that purpose was known to the vendor.
2. Where paper was sold on a warranty that it had a quality and strength equal to the paper which the vendee was then using, evidence that the paper purchased would not pass through certain machines used by the vendee without breaking is immaterial on the question whether there had been a breach of war-

ranty, in the absence of evidence that the paper in use at the time of the purchase would pass through said machines in good condition.

3. In such a case evidence that the amount of the output of the vendee's machines decreased and the percentage of waste paper increased when it began to use the vendor's paper, is immaterial, in the absence of evidence that the paper in use before the change was made was paper of the kind referred to in the warranty.

4. In an action for the purchase price of "No. 2 print paper" sold for $2.65 per hundred with an express warranty of quality, defendant alleged breach of the warranty and that the paper was not worth to exceed $1.10. Defendant's witnesses claimed that the paper was not worth more than its value as paper stock—forty-five to fifty cents per hundred; but they testified that it was all used in defendant's business of making shelf paper, and apparently it had all been sold, though the amount realized on it was not shown. It appeared without dispute that the paper could be used for circulars, etc., and there was testimony that the cheapest No. 2 print paper was worth $2.50. Plaintiff's witnesses testified that the paper in question was worth the full purchase price $2.65. *Held*, that defendant could not complain of a verdict fixing the value at $2.30 per hundred, as being based on mere conjecture, although no witness testified directly to that amount.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This was an action commenced in justice's court for the balance due for goods sold and delivered, amounting to $139. No defense was made in justice's court, and a judgment for the plaintiff was rendered, whereupon the defendant appealed from the judgment so rendered to the superior court of Milwaukee county, and in that court it interposed an answer admitting the plaintiff's claim, and setting up a counterclaim, and the case was tried upon the counterclaim.

The counterclaim alleged, in substance, that the defendant, a domestic corporation, was engaged in the manufacture of shelf paper in large quantities in the city of Milwaukee, and that the plaintiff, also a domestic corporation, was a wholesale paper dealer in said city; that in the winter of 1899 and

1900 the defendant, at the solicitation of the plaintiff, purchased from the plaintiff a car load of print paper, which was to be equal in quality, strength, and finish to the kind then in use by the defendant, at the agreed price of $2.65 per 100 pounds; that said car load was to consist of about two tons of paper, in sheets, put up in bundles 22x36 inches in size, and of about fifteen tons of white print paper, put up in rolls, sixteen inches in width, of the quality, strength, and finish aforesaid; that the paper in rolls was to be used exclusively for the manufacture of lace shelf paper, as the plaintiff well knew at the time of making the contract; that said paper was not to be delivered to the defendant, nor paid for, until April, 1900, and that the plaintiff warranted that the same would be fully equal, in quality, color, strength, and finish, to that then in use by the defendant; that thereafter, and some weeks before the time that said paper was to be delivered, the plaintiff notified the defendant that the car load of paper was ready for delivery, but the defendant could not then receive the same, because its warehouse was then full, and the plaintiff agreed to store said paper in its own warehouse without expense to the defendant, whereupon the defendant, without opportunity to examine said paper, and relying upon said warranty, paid for said car load of paper as agreed; that thereafter the defendant caused said paper to be delivered at its factory, and, upon attempting to use the same, found that it was deficient in quality, finish, and strength, so that it had not strength enough to be used for the manufacture of lace shelf paper, and was too light in weight, and had many breaks in the rolls, and that the output of defendant was thereby reduced more than one half, and large waste occasioned, while the defendant was trying to use said paper, and defendant was finally unable to use the same for the purpose intended; that said paper had then and now has no marketable value for any other purpose than that intended, and was not and is not now worth to exceed

$1.10 per 100 pounds; and that, by reason of the failure of the plaintiff to furnish paper of the quality and strength agreed upon, the defendant was greatly delayed in getting out its orders, and was unable to use the paper for the purpose intended, and has suffered damages in the amount of $450.

A reply was filed to the counterclaim, admitting the sale of the car load of paper, but denying all other allegations of the counterclaim.

The cause was tried before a jury. It appeared by the evidence that the defendant during the winter of 1899 and 1900 was engaged in the manufacture of shelf papers; that for such purpose it required rolls of white print paper, sixteen inches in width, and that such paper must have sufficient strength to run through certain rolls and machinery, specially designed for the purpose, without breaking, and that, if the paper was not sufficiently strong, frequent breaks would result, causing loss of time and waste of paper; that the plaintiff's agent who sold the paper to the defendant was aware of the special purpose for which the paper was bought, and he agreed that the same would be equal in quality and strength to that which he had theretofore sold the defendant as agent for Niedecken & Co., another paper house; that the paper was to be delivered March 15th, but that the plaintiff agreed to store the paper for the defendant until it wished it, free of charge; that the paper was paid for in two notes; and that the notes were paid during the month of May. The defendant's evidence tended to show that twenty-five rolls of paper were delivered April 7, 1900, and fifteen rolls May 5, 1900, and that the remaining 221 rolls were not delivered until June 18 and 19, 1900; that the forty rolls which were delivered in April and May were used without discovery of any difficulty therein, but that when the remainder of the paper began to be used, in June, the quality thereof proved to be poorer than that in use by the defendant when the con-

tract was made, and that it did not have sufficient strength to run through the machinery, but that constant breaks occurred therein, causing loss of time and waste of paper; that paper in sixteen-inch rolls was little used, and was not sold in the market, but had to be specially ordered; and that the market value of the paper in question did not exceed its value for paper stock, to wit, forty-five to sixty cents per 100 pounds.

The plaintiff by its evidence did not controvert the making of the warranty claimed by the defendant, but claimed that the paper was sold by sample, and that it was fully worth the price paid for it, and that there was a market for the same at the time of the sale and at the time of the delivery.

A special verdict was returned by the jury as follows:

"(1) Was the paper delivered by the plaintiff to the defendant of the quality and strength contracted for by the defendant? No. (2) Did plaintiff's agent, Meir, know for what purpose the defendant intended to use said paper? Yes. (3) If you answer the second question 'Yes,' was said paper suitable for said purpose? No. (4) Did the defendant, within a reasonable time after it commenced using the paper, notify the agent, Meir, that the paper was not accepted as fulfilling the contract? Yes. (5) What was the market value of said paper in the Milwaukee market at or about the time it was delivered? Two dollars and thirty cents per hundred pounds."

Upon this verdict the defendant moved for judgment in its favor for $24.33 and costs, and, in case such motion should be denied, for a new trial upon various grounds, including the grounds that the court had erred in rejecting evidence, and that the verdict was contrary to law and to the evidence and conjectural. Both motions were overruled, and judgment entered for the plaintiff for $96.40, and the defendant appeals.

For the appellant there was a brief by *May & Hamilton*, and oral argument by *A. B. May*.

For the respondent there was a brief by *Kanneberg, McGee & Cochems*, and oral argument by *A. Kanneberg*.

WINSLOW, J. It is undisputed that the paper in question was sold to the defendant under a warranty that it was to be equal in strength and quality to paper of the same description which defendant was then using, and which had been previously sold to the defendant by the same agent when he was acting as agent for Niedecken & Co. This court has held that, where there is an express warranty of quality of goods sold, no warranty of fitness for a particular use is implied, but that the idea that any additional warranty is expected or intended is repelled by the fact that the parties have chosen to make their own warranty in express terms. *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, 63 N. W. 1013. In this case, therefore, there was no implied warranty of fitness of the paper sold for the special use intended, although that purpose was known to the vendor; and the controlling question in the case was not whether the paper had the necessary quality and strength to pass through the defendant's machine successfully, but whether it had the quality and strength warranted, i. e., quality and strength equal to that of the Niedecken paper, which the defendant was then using. The case, however, was evidently tried upon the idea that there was an implied warranty of fitness in addition to the express warranty. The allegations of the counterclaim which are supposed to set forth breaches of warranty are plainly framed upon this supposition, the defendant's evidence upon the subject of breach of warranty is largely directed to the point that the paper sold had not strength enough to pass through the machines successfully, and the third question of the special verdict is directed to the same point. Now, had it been shown that the Niedecken paper had sufficient strength to pass through the machines successfully, evidence that the paper in question would not do so would have been material and relevant to the issue, provided there was sufficient allegation of breach in the counterclaim to found it on; but, in the absence of any proof as

to the strength of the Niedecken paper, the fact that the paper in question was too weak to pass through the machines successfully was absolutely immaterial and proved nothing. We have examined the evidence returned carefully, and find that there was absolutely no evidence showing that the Niedecken paper would pass through the machines successfully, or in any respect with better results than the paper in question. This was, in fact, the keystone of this branch of the defendant's case. All that the defendant could claim under the warranty as to strength was that the paper in question did not come up to the standard of the Niedecken paper in its ability to pass through the machines, and, there being no proof showing what that standard was, there was no foundation for any special damages resulting from insufficiency in strength.

These considerations dispose of the main question in the case. The principal assignment of error made by the defendant is that the court ruled out certain questions by which it attempted to show that when it began to use the paper in question, in June, the amount of its output was largely reduced, and the percentage of waste increased, by reason of frequent breaks in the paper resulting from its weakness. It seems to be true that, had there been either an express or implied warranty of fitness of the paper for the special use intended, there might have been a recovery of consequential damages naturally and probably resulting from its failure to fulfill such warranty, in addition to the ordinary damages consisting of the differences in value, there being evidence tending to show that paper of this kind was not ordinarily obtainable in the market. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; 2 Suth. Dam. §§ 671, 672. But in the state of the proof the answers to these questions would not tend to show any breach of the warranty as to strength which was actually made. The warranty was

that the paper should have strength equal to that of the Niedecken paper which was in use in February. There was no showing that the Niedecken paper was in use in June prior to the attempt to use the paper in question; hence the comparison in output or waste proposed by the question was absolutely immaterial, and the testimony was properly rejected.

There is another contention which requires notice. While, as stated, there was no proof given or offered tending to show that the paper in question was deficient in ability to pass through the machines, as compared with the Niedecken paper, there was some slight proof that it was inferior in some other respects, as compared with that paper; and thus it may be claimed that in these respects a breach of the express warranty was proven, and ordinary damages, consisting of the difference in value between the actual value and the value which it would have possessed had it been as warranted, were recoverable. The jury found that the paper in question was actually worth $2.30 per 100 pounds. There was no proof as to what it would have been worth if it had been of the quality warranted, save the proof of the agreed price which was paid, i. e., $2.65 per 100 pounds. The court evidently allowed the sum of thirty-five cents per hundred upon the whole amount sold as damages, and deducted the same from the plaintiff's admitted claim, and rendered judgment for the plaintiff for the balance. It is claimed by the defendant that there was no evidence to base the finding of $2.30 per 100 upon, and that the finding is a pure guess. The defendant's answer alleges that the paper was not worth to exceed $1.10 per 100, while its witnesses claim that it was not worth to exceed its value as paper stock, to wit, forty-five to fifty cents per 100. The plaintiff's witnesses claim that it was worth the full price paid for it, i. e., $2.65 per 100; and the defendant's contention is that the jury had no testimony on which it could base a finding that it was worth $2.30 per 100. The principle is well understood that a jury cannot base a verdict upon mere conjecture or guess, without some

evidence, and the question is not without some difficulty. There was, however, other evidence in the case which bore legitimately on the question of value, and tends strongly to prove that the defendant's claim that it was only worth what it would bring as paper stock was not credible. The paper was what is known as "No. 2 print paper." It was shown without dispute that it could be cut into flat sheets, and used for circulars, tablets, and dodgers. The defendant's manager testified that it was all used in defendant's business; part of it was run through the machine to fill orders, and most of it was cut up on a sheet cutter, and perforated for common shelf paper. Apparently, it had all been sold. What amount was realized on it does not appear, but the conclusion that it proved to be worth considerably more than its value for paper stock is irresistible. There was testimony, also, that the cheapest No. 2 print paper was worth $2.50 per 100 pounds. Doubtless the jury took all these facts into consideration, as they were manifestly entitled to do. The question of the value of real or personal property, or of services rendered, is one upon which there is always apt to be a wide difference of opinion, especially where it appears that there is little or no market for the same, as some of the testimony tends to show was the case here. Had the case stood upon direct testimony merely,—upon one side that the value was $2.65, and upon the other side that it was but forty-five cents,—the question would be more serious; but when the other circumstances named are taken into account, and the defendant, while showing conclusively that the value exceeded the estimate of its witnesses, does not choose to further enlighten the jury as to the amount thereof, we do not think it can now complain because the jury has fixed a sum to which no witness directly testified.

No other questions are raised of sufficient importance to require discussion. There appears to have been no prejudicial error in the trial.

By the Court.—Judgment affirmed.

HERMAN, Appellant, vs. FELTHOUSEN, imp., Respondent.

April 23—May 13, 1902.

Pleading: Joinder of causes of action: Foreclosure of mortgages: Priority of liens: Paramount title: Merger.

1. The test of whether more than one cause of action is stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication.
2. The complaint in an action to foreclose a mortgage, in addition to the usual averments, alleged that a prior mortgage had been given to one K. for the benefit of defendant F., who furnished the whole consideration, and that F. was the owner of said prior mortgage when, subsequently, the legal title to the land was conveyed to him in satisfaction of the mortgage debt. In addition to the usual relief, judgment was asked that the K. mortgage be declared extinguished and that plaintiff's mortgage be declared to be the first mortgage lien on the property. *Held*, that the allegations mentioned did not attempt to state a separate cause of action against F., involving either a question of paramount title or a question of merger by implication, but merely called for a determination, essential to complete relief, of a question of priority of liens, depending on whether or not the prior mortgage had in fact been paid as alleged.

APPEAL from an order of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Action to foreclose a mortgage. The complaint was in the ordinary form. It stated, among other things, that the mortgage was given by defendant Reigh March 2, 1896, to secure the payment of an indebtedness of $900 and interest, evidenced by a promissory note due three years after the date thereof; that the mortgage was so executed that it was entitled to record; that it was duly recorded; that it was subsequently assigned to plaintiff; that he was the owner thereof at the time of the commencement of the action; and that defendant *Felthousen,* when the action was commenced, was the owner of the fee title to the property. In addition to the

allegations necessary to a cause of action to foreclose the mortgage the complaint contained allegations to this effect: December 17, 1895, prior to the making of the mortgage in suit, Reigh and wife placed a mortgage on the property described in the complaint in favor of Sanford V. Kline, to secure payment of $4,000 in three years, with interest at the rate of seven per cent. per annum payable semi-annually. It was made for the benefit of the defendant *Barrent W. Felthousen,* who furnished the entire consideration therefor. He was the owner thereof until the same was extinguished as hereinafter stated. Subsequent to the execution of said mortgage, the mortgaged premises were conveyed to one Herman W. Koehler, who thereafter conveyed the same to defendant *Felthousen* in satisfaction of the mortgage debt. The prayer for judgment, in addition to the usual relief, asked that the Kline mortgage be declared extinguished, and that plaintiff's mortgage be declared to be the first mortgage lien upon the property affected thereby.

Defendant *Felthousen* demurred to the complaint upon the theory that the special allegations in regard to the $4,000 were intended by the pleader as a second cause of action against him alone. The grounds of the demurrer were as follows: As to the second cause of action, so called, sufficient facts are not pleaded to constitute a cause of action. As to the complaint as a whole, several causes of action have been improperly joined therein. The demurrer was sustained, and plaintiff appealed.

For the appellant there was a brief by *Hoyt & Olwell,* and oral argument by *L. A. Olwell.*

Edgar L. Wood, for the respondent.

MARSHALL, J. The complaint seems to present the ordinary case of a person seeking to foreclose a mortgage, and, as a necessary part of full relief, to have the status of the mortgage lien determined as regards hostile claims of prior-

ity not based on paramount title. There is nothing in the form of the complaint to indicate that the purpose of the pleader was to state a cause of action to foreclose a mortgage and a separate cause of action for relief against the hostile claim of a prior mortgage. All the facts in regard to both mortgages are stated in form as constituting one cause of action, and appropriate relief is asked for upon the theory that appellant's mortgage is unaffected by the ostensible prior mortgage. Respondent's counsel viewed the complaint as if the pleader intended thereby to state two causes of action, and attacked it, first, because the cause of action, so called, as to respondent was incomplete, and second, because if respondent was wrong on that proposition, then two causes of action were improperly joined. Appellant's counsel seem to have concurred in that view in the contest in the court below, and they adhere to that concession on this appeal. They insist that whether the court below held that the second cause of action, so called, was imperfectly stated, or to the contrary and that two causes of action were improperly joined, the decision is erroneous. Just how the trial court reasoned in reaching the conclusion which resulted in the order complained of does not appear.

Counsel for both sides, and the circuit court as well, misconceived the character of the complaint. That seems to have come about from an erroneous view of what may be legitimately included in a single cause of action in equity. The test to be applied in order to determine whether a complaint states more than one cause of action, is whether, looking at the whole pleading, there is more than one primary right presented thereby for vindication. There may be many minor subjects, and facts may be stated constituting independent grounds for relief, either as between the plaintiff and all the defendants, or the former and one of the latter, or between defendants, and there be still but a single primary purpose of the suit, with which all the other matters are so

connected as to be reasonably considered germane thereto,—parts of one entire subject, presenting to the court but one primary ground for invoking its jurisdiction. That was the rule before the Code, and it was preserved thereby in unmistakable language, as this court has said on many occasions. *Bassett v. Warner,* 23 Wis. 673; *Gager v. Bank of Edgerton,* 101 Wis. 593, 77 N. W. 920; *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229. In the last case cited the rule is stated thus:

"The test of whether there is more than one cause of action stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication."

There is very little need for going outside the statutes to discover that such is the law.

"The complaint shall contain . . . a plain and concise statement of the facts constituting each cause of action." Sec. 2646, Stats. 1898.

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." Sec. 2603.

Each defendant, in addition to taking issue with one or more of the allegations of the complaint by answer, may plead new matter constituting a defense or counterclaim to the plaintiff's cause of action, even though that involves a controversy between defendants. Sec. 2655. Issues may be joined between defendants, if necessary for the trial of the matters so presented to the court, and the whole subject of the action, including all the incidental controversies, may be closed by a single decree, so framed as to give to the plaintiff and to each defendant his appropriate relief. Sec. 2883.

Applying the foregoing to the pleading before us it is read-

ily seen that it states but one cause of action, and that the demurrer was improperly sustained. It presented to the court for adjudication but one subject or primary right,—the right to enforce the mortgage security owned by plaintiff to its full extent. That object reached all persons so circumstanced as to be entitled to redeem from plaintiff's mortgage, and all persons wrongfully claiming superior rights. The adjudication of such pretended superior rights was germane to the single purpose of the full enforcement of the plaintiff's mortgage. The mere general allegation to the effect that defendants have or claim to have rights or interests in the premises, but that such rights or interests, if any there be, are subject to the plaintiff's mortgage, only reached interests entitling the possessors thereof to exercise the right of redemption. A prior incumbrancer, made a party defendant, is not put to his defense to maintain his right of priority by such general allegations. *Strobe v. Downer,* 13 Wis. 10. He may properly assume that his position in that regard is not contested unless facts are specifically stated indicating to the contrary. Such facts, as to respondent, were set forth in the pleadings in question. Complete relief to appellant, as to the manifest single purpose of his suit, requires a determination of whether the $4,000 mortgage referred to in the complaint was in fact paid as alleged.

The pleading presents for consideration no question of paramount title, as counsel for respondent seems to suppose, citing *Hekla F. Ins. Co. v. Morrison,* 56 Wis. 133, 14 N. W. 12, and similar authorities. There is no dispute here, rightly speaking, as to the title. Priority of liens on title does not involve questions of conflicting titles. Neither is there any question presented by the complaint as to merger by implication, as counsel for respondent seems to think, citing *Webb v. Meloy,* 32 Wis. 319, and like authorities. The allegations of the complaint are to the effect that the legal title to the property was conveyed to respondent in payment and satis-

faction of the $4,000 mortgage. If that allegation is true, plaintiff is entitled to have his mortgage stand as a lien upon the property covered thereby the same as if the $4,000 mortgage never existed.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

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114 428
116 *305
116 *306

O'HEARN and others, Respondents, vs. O'HEARN, Appellant, and another, Respondent.

April 23—May 13, 1902.

Partition: Abatement: Wills: Construction: Devise by implication.

1. **Where the only matter in dispute between the parties to an action for partition is as to the extent of their respective interests, depending on the construction of the will of their common ancestor, that matter may be settled in the partition suit. and the fact that it has not been determined at law is not ground of abatement. *Deery v. McClintock*, 31 Wis. 195, distinguished.**
2. **The fact that a testator has made provision for one of his heirs in the will is not sufficient to justify the presumption that he intended that property otherwise undisposed of should go to other heirs in equal shares, or warrant the addition to the will of such words as "and the balance to my other two children," in the absence of anything in the will itself to indicate such intention.**

APPEAL from an order of the circuit court for Green Lake county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

Action for partition. All parties claim title from a common ancestor, Patrick O'Hearn. In 1870 the latter made a will bequeathing all his personal property to his wife, Ellenor, during her life, and at her death one half was to go to her son, the defendant *Patrick O'Hearn.* He also devised all his real estate to his wife for life, describing it, and upon

her death one half of the same was devised to defendant *Patrick*. No mention was made of other children, and no disposition of the other half of his personal or real property was made by the will. After his death, and on June 23, 1870, his will was duly admitted to probate. He left surviving him his wife, Ellenor, and three children, the defendant *Patrick*, a daughter, the defendant *Bridget Doherty*, and a son John, as his heirs-at-law. The widow died in 1899. John died in 1879, leaving his son, the plaintiff *Dennis O'Hearn*, and a daughter, the plaintiff *Mary E. Emery*, as his heirs-at-law. The plaintiff *Elizabeth* is the wife of *Dennis*. The plaintiffs bring this action for partition of the real estate left by Patrick, Sr., alleging that the plaintiffs *Dennis* and *Mary* are entitled to one fourth of the estate as the heirs of John, their interests therein being each one eighth, the defendant *Bridget Doherty* was entitled to one fourth, and the defendant *Patrick* one half.

The defendant *Patrick*, having been adjudged mentally incompetent, appeared by his guardian, and set up as matter in abatement that the title to the land sought to be divided was in dispute, and that the rights and interests of the several parties had never been determined at law, and could not be determined in this action. He also set up the facts in relation to the will of his father, and claimed that as to one half of the estate his father died intestate; that he was entitled to one half of the land under the will, and to share equally with the other children in the other half as heir of his father. The interests in the estate were alleged to be as follows: *Dennis O'Hearn*, one twelfth; *Mary E. Emery*, one twelfth; *Bridget Doherty*, one sixth; *Patrick O'Hearn*, two thirds.

The trial court overruled the answer in abatement, and found that it was the intention of the testator, as expressed in the will, to give the defendant *Patrick* one half only of the real estate described in the will, and to give the other

half to his other children; that, in order to effectuate the testator's intention, there should be added to the will the words, "and the balance to my other two children." The rights of the parties were decided on that basis, a partition was ordered, and the usual order of reference made. Due exceptions were filed, and the defendant *Patrick* appeals.

John J. Wood, Jr., for the appellant, to the point that the plea in abatement should have been sustained, cited *Deery v. McClintock*, 31 Wis. 195; *Hardy v. Mills*, 35 Wis. 141; *Tobin v. Tobin*, 45 Wis. 298; *Morse v. Stockman*, 65 Wis. 36, 43; *Ellis v. Allen*, 99 Wis. 598; *Morgan v. Mueller*, 107 Wis. 241.

For the respondent *Bridget Doherty* there was a brief by *W. E. Cavanaugh*, and for the respondents *O'Hearn* and *Emery* a brief by *Clark & Sarau*, and oral argument by *F. E. Clark*. As to the construction of the will, they cited *New England T. Co. v. Pitkin*, 163 Mass. 506, 40 N. E. 1044; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650; *Zimmerman v. Hafer*, 81 Md. 347; *Turner's Appeal*, 52 Mich. 398, 18 N. W. 123; *Marion v. Williams*, 20 D. C. 20; *James v. Pruden*, 14 Ohio St. 253; *Gourley v. Thompson*, 2 Sneed (Tenn.) 387; 29 Am. & Eng. Ency. of Law, 354, and cases cited in notes; *Deadrick v. Armour*, 10 Humph. 588; Schouler, Wills, §§ 476, 477, 490, 561; *Baker v. Estate of McLeod*, 79 Wis. 534; *In re Donges's Estate*, 103 Wis. 497, 500-502; 5 Field's Lawyer's Briefs, 622.

BARDEEN, J. 1. The answer in abatement was properly overruled. The only matter in dispute was as to the interest each was entitled to from the common ancestor. The answer admitted that the other claimants had an interest in the land. The only issue presented was as to the size of these interests. We see no reason why the controversy may not be determined in this action. See *Morgan v. Mueller*, 107 Wis. 241, 83 N. W. 313. The case is clearly distinguishable from

Deery v. McClintock, 31 Wis. 195. In that case the defendant McClintock set up a paramount title to the lands sought to be partitioned, and the court held that the remedy at law was adequate, and that where the mere legal title was the subject of controversy and in doubt it would not be adjudicated in an action for partition. Here the parties claimed title from a common ancestor. The size of the interest of each depends upon the proper construction to be given to the will which attempted to dispose of the property. The matter of the construction of the will was of cognizance in equity. The answer having admitted an absolute interest in the plaintiffs in the property, the amount or size of which depends upon the true construction of the will, we think the court had power to settle the controversy. See *Tobin v. Tobin,* 45 Wis. 298.

2. The trial court held that plaintiffs and the defendant *Bridget* took title under the will rather than as heirs-at-law of the father, and adjudged their interests upon that basis. To reach this conclusion he was obliged to hold that a devise arose to them by implication. He admitted that to so hold was perhaps "a greater stretch of implication or inference" than could be found in any of the cases. The will contained no residuary clause. The only persons named in it were his wife and the defendant *Patrick.* There is not a word or a line in it suggesting the existence of his other children. The will made a devise of the property to his wife for life, and of one half to the defendant *Patrick* on her death. There is not a hint or a suggestion in it as to the disposition of the other half. One reading the will, without knowledge as to the testator's family, would conclude at once that as to one-half of his estate the testator died intestate. So far as appears on the face of the will there is absolutely nothing to support the court's conclusions. The rule upon which a devise by implication is based is that it is raised only under

a will where the context requires it and the devise is not in express terms. It is only admitted as a means of carrying out what the testator appears on the whole to have really meant, but failed somehow to express as distinctly as he should have done. In other words, a gift by implication must be founded upon some expressions in the will from which such intention can be inferred. It cannot be inferred from an absolute silence on the subject. *Nickerson v. Bowly,* 8 Met. 424; Schouler, Wills, § 561. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind. *Bishop v. McClelland,* 44 N. J. Eq. 450, 16 Atl. 1.

The dominating rule in construing wills is that the intention of the testator is to be ascertained from the words used, in the light of all surrounding circumstances, and that intention given effect. *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786. The court cannot reform the will by changing its language or add provisions not written therein. It can only construe the instrument as written. *Sherwood v. Sherwood,* 45 Wis. 357. The trial court seems to have lost sight of this fundamental rule. There was no reference in the will to the testator's other children nor any suggestion that such children were in existence. There was no attempt to dispose of the remainder of the testator's estate, or any expression used or hint thrown out from which any inference can be drawn as to its disposition. The cases evidently relied upon by the court to sustain his conclusion (*Baker v. McLeod's Estate,* 79 Wis. 534, 48 N. W. 657, and *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786), come very far from justifying his judgment. In both cases the court construed the will according to the language used and the intent of the testator as gathered therefrom, in the light of surrounding circumstances. The presumption that a testator

does not intend to die intestate as to part of his property will aid in supporting a gift by implication when there is anything in the will itself to support it. The fact that a testator has made provision for one of his heirs in the will is not sufficient to justify the presumption that he intended that property otherwise undisposed of should go to other heirs in equal shares, in absence of anything in the will to indicate such intention. To allow such a presumption to prevail is to make a will for the testator. This the law does not permit. *Bridget* and John not having been mentioned in the will, and no words or expressions having been used therein indicating an intent to make them beneficiaries thereunder, their claim and rights depend upon the statute of descent, and their interest is only such as that statute allows. The property undisposed of by the will descended to his heirs in equal shares. This would give the plaintiffs *Dennis* and *Mary,* as heirs of their father, each one twelfth, the defendant *Bridget* one sixth, and the defendant *Patrick* one sixth, besides the interest he received under the will, or two thirds of the whole estate. The law presumes this to have been his intent from the fact that the testator made no other disposition of the one half of his estate.

Considerable emphasis is laid upon the language in the opinion in the *Donges Case,* "that there shall be added to the first paragraph of the will" certain words to complete the actual intention of the testator. The seeming inference is drawn that this court intended thereby to hold that it had power to amend the will by adding words to complete its meaning. All that was intended by the decision in that case was that the will should be so construed as if the added words had been used by the testator, and that his intention in that regard was clearly apparent from the terms of the instrument itself and the surrounding circumstances. The effort was to carry out the clear intent of the testator as evi-

denced by his will, and not to amend or change the will in any respect.

By the Court.—The order or judgment is reversed, and the cause is remanded with directions to enter an order or judgment fixing the rights of the parties as indicated in the opinion, and for further proceedings according to law.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent, vs. ARNOLD and another, Appellants.

April 24—May 13, 1902.

Tax titles: Limitation of actions: Exempt property.

Under sec. 1189, Stats. 1898, and even in the absence of such a statute, no limitation in favor of a tax deed or a tax certificate, except in case of actual possession founded on a tax deed, is applicable where the land sold for taxes was exempt from taxation.

APPEAL from an order of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

Carl D. Jackson, for the appellants, contended, *inter alia,* that the case comes directly within the express terms of sec. 1210*h,* Stats. 1898. There is no distinction in this state between objections going to the groundwork and objections going to the jurisdiction. *Dean v. Madison,* 9 Wis. 405; *Eldred v. Leahy,* 31 Wis. 554; *Pound v. Chippewa Co.* 43 Wis. 66; *Massing v. Ames,* 37 Wis. 651; *Wells v. Western P. Co.* 96 Wis. 122; *Marsh v. Clark Co.* 42 Wis. 509; *Philleo v. Hiles,* 42 Wis. 529; *Ruggles v. Fond du Lac Co.* 63 Wis. 211; *Urquhart v. Westcott,* 65 Wis. 140; *Prentice v. Ashland Co.* 56 Wis. 346; *McDonald v. Daniels,* 58 Wis. 430; *Green Bay & M. C. Co. v. Outagamie Co.* 76 Wis. 592; *Brown v. Oneida Co.* 103 Wis. 159; *Pratt v. Milwaukee,* 93 Wis. 658; *Levy v. Wilcox,* 96 Wis. 128. If the assessors

acted without jurisdiction in levying the tax in question, an action would lie against them for damages at the instance of this plaintiff. Cooley, Taxation, 553; *Weaver v. Devendorf,* 3 Denio, 118. It has, however, been held that the assessors in determining exemptions act judicially and with jurisdiction. *Vail v. Owen,* 19 Barb. 22; *Brown v. Smith,* 24 Barb. 420; *Barhyte v. Shepherd,* 35 N. Y. 238; *Chegaray v. Jenkins,* 5 N. Y. 380. If sec. 1189 is general in its application, covering all limitations, then the special provision of sec. 1210*h,* in conflict therewith, must control. If sec. 1189 applies to the case at bar, the two sections conflict, and sec. 1210*h,* being the later provision, must prevail. In any event there is a distinction between the words "liable to taxation," and the words "exempt from taxation." Property not liable to taxation is property not subject to taxation at all, such as public property. In addition to this the legislature may exempt certain property. Railroad property is liable to taxation either by direct taxation or by the method now in vogue, and the latter may be changed to direct taxation at any time. Sec. 1189, therefore, is not applicable. See *Barhyte v. Shepherd,* 35 N. Y. 251; *Coney v. Owen,* 6 Watts, 436.

For the respondent there was a brief by *Edward M. Hyzer,* attorney, and *Thompsons, Hollister & Pinkerton,* of counsel, and oral argument by *A. E. Thompson.*

WINSLOW, J. This is an action to set aside certain tax sales of real estate, and to bar the holder of the tax-sale certificates from any right or interest in said real estate. The complaint was demurred to on the ground that the cause of action was barred by the provisions of sec. 1210*h,* Stats. 1898, because the complaint showed that the action was not commenced within one year from the date of the tax sale. The complaint did show this fact, but it also showed that the lands in question were at the time of the levy of the tax,

and ever since have been, used by the plaintiff for railroad purposes, and hence were exempt from general taxation. Whether this allegation that the lands were exempt from taxation when the supposed tax was levied removes the case from the one-year limitation prescribed by sec. 1210*h* aforesaid is the only question in the case. This question must be answered in the affirmative by virtue of the plain terms of sec. 1189, Stats. 1898, which is contained in the same chapter as sec. 1210*h*, and which provides, among other things, that, except in cases of actual possession founded on a tax deed, no limitation in favor of a tax deed or a tax certificate shall apply where the taxes were paid prior to the sale, or where the land was redeemed from the sale as provided by law, "or where the land was not liable to taxation." In the absence of the statute, the result would be the same. The land being exempt from taxation, there was a want of authority *ab initio* to set the machinery of taxation in motion, or, in other words, there was no jurisdiction on the part of the taxing officers. Where such is the case, this court has held that there is nothing for a statute of limitation to act upon. *Smith v. Sherry,* 54 Wis. 114, 11 N. W. 465.

By the Court.—Order affirmed.

STATE OF WISCONSIN, by the Attorney General, etc., R. F. CONNELL, Receiver, Appellant, vs. GERMAN EXCHANGE BANK and others, Respondents.

April 24—May 13, 1902.

Appealable orders: Discretion: Substitution of administrator as appellant: State and federal courts: Bankruptcy: Receivers: Compensation.

1. After the appointment of a receiver in an action by the attorney general to wind up the business of a banking partnership, the partners were adjudged bankrupts in the federal court. On

motion of the trustee in bankruptcy the state court ordered that all the property be turned over by the receiver to such trustee. *Held*, that the order was a final order affecting a substantial right made in a special proceeding, and, unless a proper exercise of discretion, was appealable under subd. 2, sec. 3069, Stats. 1898.

2. The receiver having died after appealing from the order, it was proper to allow his personal representative to be substituted as appellant.

3. The superior jurisdiction of the federal court over the property was conceded by all parties, and the order was so framed that any legal claim of the receiver to compensation for his services and expenses followed the property into the hands of the trustee as a lien thereon. *Held*, that it was not an abuse of discretion so to protect the receiver's rights, instead of adjusting his account and ordering payment out of the funds in his hands before relinquishment thereof to the trustee in bankruptcy.

[4. Whether the bankruptcy proceeding entirely superseded the jurisdiction of the state court, leaving the latter no authority in the matter other than to order the property turned over to the trustee, not determined.]

5. An appeal from a mere discretionary order will be dismissed if there was no abuse of discretion.

APPEAL from an order of the circuit court for Calumet county: GEORGE W. BURNELL, Circuit Judge. *Appeal dismissed.*

On July 23, 1901, in an action commenced by the attorney general of the state pursuant to ch. 317, Laws of 1901, to wind up the business of a banking partnership conducted in the name of the German Exchange Bank and composed of *Theodore* and *Henry Kersten, R. F. Connell* was appointed receiver. He took possession of the assets of the banking firm and entered upon the execution of his trust. Subsequently the two *Kerstens* were duly adjudged bankrupts in the federal district court for the Eastern district of Wisconsin, and thereafter such proceedings were had in such court that *John C. Kleist* was elected as trustee. Thereafter such trustee appeared in the state court and upon due notice applied for an order requiring the receiver to turn over to

him, to be administered by the federal court in bankruptcy, all of the assets in his hands as such receiver. The application was first granted as to all the assets except $4,500. That was retained temporarily, to await a decision as to whether the receiver was entitled to have his expenses and allowance for services adjusted by the state court and paid out of the money in his hands as receiver, and to turn over to the trustee only such part of the $4,500 as might remain after such payment. That was decided against the receiver. An order was then entered requiring him to pay the $4,500 to the trustee, subject to whatever claim he might have for expenses and services rendered in the receivership suit, his account therefor to be adjusted and ordered paid according to the judgment of the federal court in the bankruptcy proceedings. From that order this appeal was taken. After the appeal was taken the receiver died, and an administrator, duly appointed to settle his estate, was substituted to continue the appeal.

J. C. Kerwin, for the appellant.

J. E. McMullen, for the respondent *Kleist.*

For the respondents *Kersten* there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

MARSHALL, J. Respondents' counsel, pointing to *Allen v. Boberg,* 108 Wis. 282, 84 N. W. 421, for support, contend that the order is not appealable. In the case cited the order dismissed the suit as to one defendant, leaving it to proceed to final judgment as to others. We fail to observe any similarity between that situation and the one before us. The order in question was not entered between the parties to the action against the *Kerstens.* It was entered in a special proceeding instituted therein by the trustee in bankruptcy, who appeared in the state court for that purpose only. If the action were to proceed to judgment, an appeal therefrom would not bring the order up for review. That terminated

the special proceeding. It affected a substantial right. Therefore it is appealable under the plain language of subd. 2, sec. 3069, Stats. 1898, unless it must be held otherwise upon the ground that the order was proper in the exercise of judicial discretion.

Connell, being a sole trustee, possessed, as such, at the time of his death, of personal property, the legal title thereto passed to his representative, the administrator of his estate. Such representative was bound to execute the trust so far as necessary to preserve the subject thereof till he should account to a successor appointed by the court, and was entitled to take all necessary proceedings to secure a settlement of the deceased receiver's accounts. Perry, Trusts, §§ 341–344; 2 Woerner, Adm'n, § 321; *Schenck v. Schenck,* 16 N. J. Eq. 174, 182. Therefore it was proper to allow him to be substituted as appellant in this court for the purpose of prosecuting this appeal to a final determination.

The federal court did not decide that the bankruptcy proceeding entirely superseded the jurisdiction of the state court in the receivership case, leaving the latter no authority in the matter other than to order the property in the hands of the receiver turned over to the trustee. That is clearly indicated by the opinion of the district judge, which appears in the record. It was competent for the federal court to declare the *Kerstens* bankrupts and to take such proceedings as were necessary to have a trustee elected and qualified to administer their affairs in that court, leaving the question of its jurisdiction over the property in the hands of the receiver appointed by the state court, for subsequent determination. It took that course. The trustee then presented to the latter court for consideration the question of his authority over the estates of the bankrupts in its charge. He did not, so far as appears, obtain any adjudication of his right in the matter or judicial advice in respect thereto in his own jurisdiction. On the hearing on such question in

the state court all persons interested seem to have consented to its relinquishing jurisdiction of the property to the trustee, except the receiver, and his objection went no further than to question the trustee's right thereto in advance of the former's account for services and expenses being adjusted and paid by the court that appointed him. True, the circuit judge made the order complained of upon the theory that the jurisdiction of his court over the property terminated with the adjudication in bankruptcy, but no such effect of such adjudication had theretofore been asserted by the federal court, nor was it, so far as appears, asserted thereafter. Whether the lower court's theory is right or not we do not deem necessary to decide on this appeal. Since all parties interested as creditors, as before indicated, have submitted to the jurisdiction of the federal court, and the order relinquishing the property to the trustee was so framed that whatever legal claim the receiver had at the time of the entry thereof was not affected thereby but will follow the property covered by it into the hands of the trustee as a lien thereon, the receiver was not prejudiced by such order. Under the circumstances the circuit court was not without power to turn the property over to the federal court, so long as the rights of its officer were reasonably protected. The superior jurisdiction of the federal court over the property having been conceded, the proper manner of protecting the receiver in his right to compensation for services and expenses became a mere matter of judicial administration, and the action of the circuit court in respect thereto cannot be disturbed except for manifest abuse.

How the order appealed from can be justified upon the theory of the court below is not entirely clear, as a reference to the following authorities will indicate: *In re Whipple,* 6 Biss. 516, 29 Fed. Cas. 929, 11 Nat. Bankr. R. 524; *In re Clark,* 5 Fed. Cas. 835, 838; *Clark v. Binninger,* 39 How. Prac. 363; *In re Lengert Wagon Co.* 6 Am. Bankr. R. 535,

110 Fed. 927; *In re Independent Ins. Co.* 6 Nat. Bankr. R. 260, 13 Fed. Cas. 13; Black, Bankruptcy, 260; *Thornhill v. Bank of La.* 3 Fed. Cas. 1139. In *In re Clark, supra,* the court held that jurisdiction over the assets of a person, acquired by the original exercise of the jurisdiction of a court of equity, is not superseded by a subsequent adjudication in the federal court declaring the owner thereof a bankrupt. The following language is used in the opinion by Mr. Justice BLATCHFORD:

"When property is lawfully placed in the custody of a receiver by the court which appoints such receiver, it is in the custody, and under the protection and control, of such court, for the time being, and no other court has a right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. In the present posture of this case it does not appear that this court has such superior jurisdiction in the premises, or such supervisory control over the state court, in respect to the property in question, as to authorize it to take away from the state court the possession of such property, or to enjoin the receivers from further interfering with such property."

In *Thornhill v. Bank,* opinion by WOODS, Circuit Judge, it was held that a law specially providing for the winding up of insolvent banking institutions and the distribution of their assets,—a law similar, in many respects, to the law of this state under which the proceeding was commenced in the state court in which the receiver was appointed,—was a bankrupt law, and was suspended by the bankrupt act. Judge SEAMAN, in his opinion in the bankruptcy proceeding in question, recognized the legality of the proceedings in the state court appointing the receiver, and the existence of some doubt as to the power of the federal court to take the property from him in a compulsory way; that a solution of that question might involve a determination as to whether our state law in regard to winding up insolvent banking corpora-

tions so far partakes of the character of a bankrupt act as to be entirely displaced by the national bankruptcy law. The authority of the federal court in the matter was left open for consideration as necessity therefor might arise, the idea being that in any event the state court should have full opportunity for deciding upon its own jurisdiction without coming in conflict with any decision in respect thereto, as to the same subject matter, previously rendered by the federal court; and that if the circuit court should concede the jurisdiction of the federal court, no occasion would arise for the latter to assert jurisdiction.

We will forego deciding the questions which the federal court avoided, as above indicated, until some real necessity therefor exists. We consider that the decision of the court below in that regard is not before us; that the only question here is this: The right of the federal court to take and administer the property in the bankruptcy proceedings being conceded, did the trial court err in not protecting its receiver as regards his charges for expenses and services by adjusting his account and ordering it paid out of the funds in his hands before relinquishing the same to the trustee in bankruptcy? In that we can see no abuse of discretionary, administrative power, since, as before indicated, the court's action was based on an adjudication that the receiver's reasonable charges constitute a lien on the fund in his hands to be discharged only by the payment thereof, and that such lien will incumber the fund in the hands of the trustee.

While in *Mauran v. Crown C. L. Co.* (R. I.) 50 Atl. 387, relied upon by appellant's counsel, the receiver was ordered paid out of the funds in his hands, and he was required to turn over only the residue to the trustee in bankruptcy, the court recognized that the proper course to pursue was a mere matter of judgment,—the exercise of judicial administration. If the trustee accepts the fund involved under the order, he will necessarily do so subject to the terms imposed thereby.

The order, as a whole, will doubtless be respected by the federal court if any part of it is acted upon by the trustee with such court's approval. Assuming submission to the order as a whole, no reason is perceived why the circuit court should not pass upon its receiver's account, if he desires it, leaving the federal court only the duty to order it paid, and not impose upon such court the burden of examining and passing upon the details of the account, the justice of which it cannot, in the very nature of things, be as fully advised of as the home court. So far as appears by the record, the receiver's claim has never been presented to the circuit court for consideration. The complaint is not that such court refused to pass upon the account, but that it ordered the property in the hands of the receiver turned over to the trustee in advance of the payment of the receiver's charges. If the federal court recognizes that the reasonable charges of the receiver constitute a lien upon the property in the hands of the trustee—and we assume that it will do so, as before indicated, if the trustee takes the fund from the receiver pursuant thereto—it will doubtless recognize the adjudication by the state court of the amount due the receiver, if such court shall see fit to pass upon the account.

Regarding the order appealed from as a mere discretionary order, since no abuse of discretion is found the appeal should be dismissed. *McElroy v. Minn. P. H. Co.* 109 Wis. 116, 85 N. W. 119.

By the Court.—So ordered.

RADKE, Respondent, vs. M. WINTER LUMBER COMPANY and another, Appellants.

April 24—May 13, 1902.

Setting aside judicial sale: Laches: Foreclosure of lien.

In an action to set aside a sheriff's deed it appeared that plaintiff had contracted for the purchase of the land and had made payments; that a lien for building materials furnished to him was foreclosed, after a contest, and the judgment directed a sale of his interest in the land; that his attorney, not being informed that plaintiff had any interest in the property, in good faith advised him that the lien was invalid, but the lienor did not know of such advice; that nearly two years later plaintiff had a conversation with the lienor relative to a settlement, but no agreement to delay enforcement of the judgment was made; that soon after the land was advertised and sold pursuant to the judgment; that notice of motion to confirm the sale was given to plaintiff's attorney, but he, still supposing plaintiff had no interest, did not notify the latter; and that the sale was duly confirmed. *Held*, that plaintiff had been guilty of laches and was not entitled to relief.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

In September, 1893, the plaintiff purchased lot 11, block 159, of the city of Sheboygan, under a land contract. Payments were to be made during a series of years, the last one being due January 16, 1899. Plaintiff entered into possession of the property, and made certain improvements thereon. He purchased building materials from the defendant *M. Winter Lumber Company,* and failed to pay for them. The defendant filed its lien, and brought a suit to foreclose. The plaintiff appeared in the action, and judgment was finally entered for the company on May 21, 1897, for $366.28 and costs, which was declared to be a lien upon the interest plaintiff had in the premises on September 14, 1893, or had since acquired. A sale of the interest of plaintiff in the premises was directed in case said sum, costs, and interest were not

paid. No proceedings to collect the judgment were taken until 1899. The property was duly advertised for sale, commencing in January, 1899, a sale was had on March 20th of that year, and the premises were bid off by the judgment creditor for the amount due on the judgment and costs of sale. Notice of a confirmation of the sale was given the plaintiff's attorney, and the sale was duly confirmed on April 29, 1899, and a deed duly executed to the purchaser. On May 13, 1899, the company sold the premises to the defendant *Cudahy Bros. Company,* giving them a bond to perfect the title. In the meantime plaintiff paid the balance due on the land contract, and had the title conveyed to one A. G. Bechaud as security for a loan on December 23, 1898. June 17, 1899, Bechaud conveyed the property to plaintiff.

On June 20, 1899, the plaintiff commenced this action to set aside the deed from the sheriff to the *M. Winter Lumber Company* and the deed from the latter to the *Cudahy Bros. Company.* The grounds of plaintiff's cause of action sufficiently appear from the findings, without a statement of the allegations of the complaint. The defendant lumber company justified under its judgment and the sale thereunder. The court made findings in favor of plaintiff, which, so far as relate to the plaintiff's right to set aside the deeds in question, may be briefly stated as follows: Plaintiff was advised by his attorney, D. T. Phalen, who was acting in good faith, that the judgment obtained in the proceedings to foreclose the company's lien was null and void, and he believed such advice was correct. About February 15, 1899, plaintiff had a conversation with Arthur F. Winter, defendant's president, and made him a proposition for the discharge of the lien judgment for some amount less than its face, and it was then understood that Winter should consult with the stockholders of the company relative to the acceptance or rejection of the plaintiff's proposition, and would notify plaintiff of their conclusion, "and that in the meantime, and until said presi-

dent should give to the plaintiff the information so agreed to be given him, no further costs should be made and no further steps should be taken upon said judgment." The company and its president failed to give plaintiff any notice as agreed, and in violation of its agreement, and without any actual notice to him, sold the property under their judgment. Plaintiff was misled to his detriment by not receiving notice of the acceptance or rejection of his proposition, in that the sale was made at a time when he understood it would not be made, and he was thereby prevented from securing, as he might otherwise have done, a much higher bid at the sale. The court further finds that timely notice of the confirmation of the sale was given his attorney, but plaintiff was not informed of it. A tender of the amount of the lien, judgment, and costs was made June 3, 1899, and the money was paid into court.

A judgment was entered setting aside the deeds mentioned, from which the defendants have taken this appeal.

Paul T. Krez, for the appellants.

For the respondent there was a brief by *Duffy & McCrory,* and oral argument by *J. H. McCrory.*

BARDEEN, J. Plaintiff has no right to have the deed on the lien foreclosure sale set aside, unless it clearly appears that he was deceived and misled by the acts of the defendant lumber company. The fact that the plaintiff was advised and believed that the lien judgment was invalid can have no significance, as it is not shown that the officials of the lumber company had any knowledge of that fact. The plaintiff was guilty of the grossest laches. The lien judgment was obtained in May, 1897, after a contest. His attorney testifies that he advised him the lien was invalid because he did not suppose or know that plaintiff had a dollar's worth of interest in the property upon which the lien was claimed. If that was a fact, of course there was nothing to which the lien might

attach. At that time plaintiff had a land contract with the owner, upon which payments had been made. Presumably the plaintiff failed to inform his attorney of the true situation. He waited nearly two years after judgment before doing anything. He then approached defendant with a proposition to pay a portion of the judgment. His testimony regarding the talk with Mr. Winter is brief, and is as follows:

"I told him under the circumstances that I hadn't ought to be compelled to pay the costs and interest up to date, and Mr. Winter answered me in this way: that he couldn't do anything himself; he would see the company, and let me know." "I made him several propositions, and he said he couldn't do anything, except everything in full, until he saw the company. That is what he said to me, and he would write me and notify me what the company would do." "The last word I said to Winter was on the 15th of February. I says, 'Arthur, don't make any more costs; whatever you do, let me know.' He said he would."

He testified, further, that he received no word from the company. Mr. Winter expressly denied that he was to take the proposition under advisement. He informed plaintiff that he would not accept anything less than the face of the claim and interest, and that if the stockholders of the company felt disposed to give him anything he would let him know. On the same day he wrote plaintiff a letter. The sale took place on March 20, 1899. On March 29th personal notice of motion to confirm the sale was served on plaintiff's attorney, and on April 29th the sale was duly confirmed. In the meantime plaintiff did not exercise the slightest vigilance. Apparently he was resting secure in the belief that the lien judgment was invalid. As we have already seen, his belief in that regard was founded upon his failure to inform his attorney of the real status of his title. His attorney failed to notify him of the application to confirm the sale because he did not suppose plaintiff had any interest in the property. The notice to his attorney was notice to him. More than a

month elapsed after the sale before it was confirmed. The sale was duly advertised, proper notice of the several steps given, and ample opportunity offered for plaintiff to protect his rights. The trial court found that the various proceedings were regularly taken, and then declared that the company violated its agreement that no further costs should be made and no further steps taken by it until it should give plaintiff information whether it would accept less than the amount due on the judgment in satisfaction. The difficulty with this finding is that the evidence entirely fails to support it. There is absolutely no evidence in the case of an agreement to delay proceedings on the judgment. Admitting all that plaintiff says as to the conversation with Mr. Winter to be true, it fails entirely to sustain the finding. If the plaintiff has suffered loss or sustained a hardship, he has only himself to blame. In absence of any evidence showing that he has been misled, deceived, or overreached by the defendant, he is not entitled to relief. We find no such evidence in the record, and must therefore reverse the judgment.

By the Court.—The judgment is reversed, and the cause is remanded with directions to enter judgment for the defendants dismissing the complaint.

OKONSKI, Respondent, vs. THE PENNSYLVANIA & OHIO FUEL COMPANY, Appellant.

April 24—May 13, 1902.

Master and servant: Injuries through negligence: Fellow-servants: Special verdict: Instructions to jury.

1. In an action for personal injuries sustained by a common laborer upon defendant's coal docks, alleged to have been caused by negligence of the foreman in placing the tripping device upon a wire cable, whereby the coal in a bucket running upon said

cable was dumped outside of the hopper into which it should have emptied, and upon the plaintiff, who was passing beneath, there was no claim that there was any defect in the apparatus itself or in the system by which it was generally operated; and it appeared that the shifting and placing of the tripper was merely a detail in the operation of the apparatus, done frequently in the unloading of a vessel, and commonly by members of the working force to which plaintiff belonged. *Held*, that in so placing the tripper the foreman was merely a fellow-servant of the other employees, including plaintiff, and that for any negligence therein the defendant is not liable.

2. In such a case the facts that the foreman had authority to hire, discharge, and direct the dock force, and was charged with the duty to see that the docks were so operated as to be safe, and to provide necessary lights, signals and warnings, did not render him other than a fellow-servant of plaintiff while performing the specific act mentioned.
3. It appeared that it was customary, when unloading a vessel at night, to place gasoline torches at the hoppers into which the coal was to be dumped, and that this was the duty of certain of the dock force known as "water boys." Defendant had provided such torches. *Held*, that the omission to use them at the moment of plaintiff's injury, if negligence, was negligence of his fellow-servants.
4. The submission, in a special verdict, of numerous questions relating to merely evidentiary facts, and the giving of instructions, in connection therewith, containing unnecessary statement of general rules of law, are criticised.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action for personal injuries suffered by the plaintiff as an employee in the coal yard of the defendant at Manitowoc. That yard was about 500 feet long north and south, bounded on the east by the slip into which vessels entered. Immediately adjoining the water were a series of four towers on tracks parallel to the dock line, some thirty-five feet high, in each of which was situated a steam engine and its operator. Extending from each of these towers westward to the hard coal shed, a distance of about 150 feet, was a steel cable, upon which the buckets lifted from the vessel were transported by

the engine located in the tower. The coal carried in these buckets might be delivered at various points between the tower on the east and the coal shed at the extreme western terminus of the cable. Thus, immediately west of the row of towers was an open space of perhaps seventy-five feet in width, known as the "platform," upon which it was customary to dump soft coal, and which at times was piled up over its whole surface therewith, although at the time of the injury it was nearly free from coal. Next to this open space were a series of four hoppers, about twenty-eight feet from the ground, located one under each of the cables and each communicating over screens with a railroad track, onto which cars were customarily run to receive coal which it was desired to put immediately aboard cars. The buckets held about a ton of coal each. The usual method of causing them to dump at one place or another was by placing upon the cable, at about the spot, a device called a "tripper" or "dumper," which, coming in contact with the latch upon the bucket, caused it to empty. These trippers also ran on trolley wheels along the cable, being secured at the westerly end to the stanchions of the shed and running down by their own weight when the rope holding them was loosened. When it was desired to empty the buckets at any point between the tower and the shed, this tripper was, by certain of the employees, lowered down by this rope to the desired point, and the rope then secured. The method of doing this was for a man to go up to the roof of the shed to handle the rope, and another to stand in his sight upon the platform, and signal to him when the proper point had been reached.

At a little after 4 o'clock on the day in question, to wit, the 30th day of November, 1897, the unloading of a new vessel was commenced, and the buckets, which from the preceding vessel had been emptying at their extreme western terminus into the coal shed, were desired to be emptied into the hoppers above spoken of, adjoining the railroad track. Ac-

cordingly, one Graham, who is designated as a foreman, directed two of the men on the dock to go up and lower the tripper on the southernmost cable, known as "cable No. 1," saying that he would signal to them when it had reached the right point. This process was called "spotting." They untied the rope, cast off a considerable amount of slack, and let the tripper run down. For some reason—whether because they did not keep sufficient control of it, or because Graham did not signal soon enough—it ran down to a point some ten or fifteen feet east of where it should be for the purpose of making the bucket empty into the hopper, and Graham immediately gave signals to haul it back, but before that could be done the engineer in the tower sent a bucket of coal westward on the cable, having no knowledge of what was going on at the other end. The bucket came in contact with the tripper, and its contents were precipitated onto the platform just as the plaintiff was passing under the cable in the performance of his duties in going toward the south end of the yard to aid in pushing down some railway cars.

It was in proof that it was a stormy night, and quite dark, but that the yard was lighted by eight electric lights, so that the cable was easily in sight of those walking under it; but there was evidence also that it was customary to fix a gasoline torch near the eastern corner of the hopper when dumping coal there, which enabled the engineer in the tower to see when the bucket approached its destination, and slow it up somewhat before its collision with the tripper. Those torches were supplied, and it was the duty of certain members of the crew in the yard to put them in place when desired by the engineers. None had yet been placed on the hopper near which plaintiff was injured. Plaintiff had worked about coal yards for twelve or fifteen years, but upon this particular yard, which varied somewhat in its apparatus, only about six days. The work done upon the dock and yard was various, consisting generally in the unloading of coal from

the vessels, the distribution thereof to various parts of the yard both by the cables in question and by wheelbarrows, the incidental screening of it, the loading upon railway cars, and the removal of the screenings to other parts of the yard. Plaintiff was a common laborer engaged in such work as was indicated to him, and on the day in question had been wheeling soft coal from the north end of the platform to some other point. At the time of injury, as already stated, he had started with two other men to move cars down onto the railway track adjoining the hoppers.

Motion to direct verdict for defendant was overruled, and a special verdict in answer to twenty-seven questions was taken, upon which, after motion for new trial, judgment was rendered in favor of the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *L. J. Nash.*

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

DODGE, J. The most vital question presented among the many assignments of error is whether there is any evidence to warrant the jury in finding any failure on the part of the defendant in its duty to provide a safe place for plaintiff to work and safe appliances to work with. Neither in the complaint nor in the evidence is there any suggestion that either the place or the apparatus was unfit, dangerous, or defective, as orginally constructed. The allegation is that the passing bucket was negligently tripped by an agent or agents of defendant; that the tripper or dumper was negligently placed on said cable too far east, by and under the direction of the foreman or manager of said coal docks, and by certain men employed to assist in operating and handling machinery. Thus it is seen that the negligence complained of is that of certain persons in doing a momentary act at the time of the accident,

not a condition of either place or apparatus which had been provided for the general purpose of unloading and handling coal in the yard. Obviously, then, we are brought to the question whether the person or persons whose negligence caused the injury were fellow-servants of plaintiff in the legal significance of that term.

Fellow-servants are defined by Bouvier as "those engaged in the same common pursuit, under the same general control" (1 Bouv. Dict. Rawle's Revision, 768); by Bailey, as "persons . . . employed in the same general business by a common employer." (Bailey, Mast. & S. § 1796). It is, however, well recognized that if a master delegates the performance of his legal and contractual duty to prepare the place or apparatus for use, the delegatee in performing that duty is not deemed a fellow-servant with those who may afterward use the place or apparatus so prepared. But it is also entirely well settled that the rank or grade of the person doing any work, or, indeed, the character of his general duties, do not control the question whether he is a co-employee with others in doing any specific act. That depends on the character of the particular service in the performance of which he is charged with negligence. Neither is the question controlled by the fact that different parts of the work necessary to the general enterprise are placed in hands of employees remote from each other, and receiving immediate command from different superiors, or, indeed, one from the other. *Hoth v. Peters,* 55 Wis. 405, 13 N. W. 219; *Toner v. C., M. & St. P. R. Co.* 69 Wis. 188, 31 N. W. 104, 33 N. W. 433; *Dwyer v. Am. Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Porter v. S. C. & M. Coal Co.* 84 Wis. 418, 54 N. W. 1019; *Hartford v. N. P. R. Co.* 91 Wis. 374, 379, 64 N. W. 1033; *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Prybilski v. N. W. C. R. Co.* 98 Wis. 413, 74 N. W. 117; *Portance v. L. V. Coal Co.* 101 Wis. 574, 77 N. W. 875.

The question whether or not Graham or those who were

lowering the tripper were fellow-servants of plaintiff in adjusting it was not submitted to the jury, nor passed on by them. They were asked merely whether Graham was the representative of the company, with authority to hire, discharge, and direct the dock force, and charged with duty to see that docks were so operated as to be safe, and to provide necessary lights, signals, and warnings; all of which they affirmed. These facts were inconclusive. Graham might have occupied any—even the highest—grade of employment, and still have been a fellow-servant in any specific service. That he represented the master in hiring men might have made defendant liable for hiring of known incompetents by him; that he had authority to provide lights, signals, or warnings might have resulted in the master's liability if defective ones had been provided; but neither fact would warrant liability for his negligence in performing some of the general work in which the yard force were engaged. A quarry company, for illustration, would no more be liable for injury to him who held a drill from negligence of the wielder of a sledge because the latter happened to be the general manager of the business and the former the lowest of laborers.

From what has been said it is apparent that the verdict does not support the judgment, and examination of the evidence becomes necessary to ascertain whether the defect is supplied thereby. Upon such examination we find the testimony as to the character of Graham's service in "spotting" the tripper to be all one way, and without dispute. The whole apparatus had been supplied by the defendant. It included as one of its elements the tripper device, with its appliances, as described in the statement of facts, for adjusting it to the particular place of emptying the buckets of coal; and involved the process of one or more men lowering the tripper to such place with the aid of another man to indicate it by signal. No defect is suggested, either by complaint or by evidence, in the apparatus itself, or in the system by which

it was customarily operated. The testimony is also wholly without conflict that the shifting and placing of these trippers was simply a detail in the operation of the apparatus, necessary to be done frequently in the course of unloading and distribution of the same boat load of coal. It also shows that it was done commonly by members of the force performing that general work. Thus a man, Jarnek, with whom plaintiff was working at the very time of his injury, usually did such work in the daytime, and a similar employee, McCarty, in the nighttime. All that could, by any possibility, be deemed an act of the employer, might be the information as to where coal should be distributed. The yard force thereupon manipulated the details of the labor and machinery whereby that policy was to be accomplished. This was as much a detail of the operation as the act of the hoister in handling the throttle of his engine according as the bucket was to be sent a longer or shorter distance, or of the bucket loaders in latching the bucket before starting on its trip.

We have no hesitation in reaching the conclusion that one performing that act was, in so doing, a fellow-servant with the other employees on the dock, and that for any negligence therein the master would not be liable under the authorities above cited. Since the complaint alleges no other ground of liability, such conclusion would seem to fully dispose of the case.

It, however, appears that the court admitted evidence, and submitted to the jury as an issue, the question whether the failure to place a torch on the east side of the coal hopper was negligence proximately causing the injury. In thus permitting plaintiff to travel outside the issues framed by the pleadings, we think specific error was committed, but do not pause to discuss it, since the same views above expressed with reference to spotting the tripper apply with equal force to the placing of such torches, and render the fact inconclusive upon defendant's liability. The evidence shows conclu-

sively that when, in the course of distributing the coal from a vessel, it was to be dumped into the hoppers, it was customary, as one of the details of the adjustment of the apparatus, to place a torch on the hoppers, and that this was the duty of certain of the dock force known as "water boys." The defendant had provided torches and apparatus. The omission to use them at the moment of plaintiff's injury, if negligent, was the negligence of those associated with him in a common service.

Were the views already expressed less conclusive, not only of this appeal, but apparently of the case itself, we should feel obliged to go at length into commentary upon the manner of the submission of the case to the jury, and to make both the special verdict and the instructions accompanying it our text. The verdict contains twenty-seven questions. By far the greater majority thereof relate only to evidentiary facts, and some of the ultimate issues of fact are not submitted. In the view of the evidence obviously taken by the trial court, those issues were: first, With reference to the placing of the tripper, was Graham a fellow-servant; and, secondly, Was he negligent? Neither of these issues are submitted. With reference to the torch, supposing the subject had become properly a part of the case, the issues were whether its absence rendered the place of work unsafe, and, if so, whether the defendant had failed to supply such device, or whether its absence was due to the neglect of fellow-servants to perform the duties imposed upon them. These are not directly submitted in any questions of the special verdict. It is true that upon these questions there was no conflict of evidence, but that consideration, while it might justify the omission of questions covering such issues, rendered improper the submission of any question whatever with reference to the torch, its absence, and the effect thereof, of which there were several. The question of proximate cause was not inaccurately defined, but was submitted by three questions, one of which

fully covered the subject, and the other two were but cross-examination, presenting to the jury ideas which might, ought properly, and, indeed, were, communicated to them by instructions, to guide them in answering the simple question whether the absence of torch and misplacement of the dumper were the proximate cause of the plaintiff's injury.

In the instructions we find quite extended declaration of general rules of law governing the duty and responsibility of the master to his servants, which were wholly unnecessary, and which approached closely, at least, to the forbidden field of informing the jury of the effect of answers to certain of the questions, and which were at least much better omitted from the instructions and reserved in the breast of the judge as his guide in deciding what judgment should result when the jury had settled the issues of fact. It is due to the trial judge to note, however, that this case was tried not only at an early stage in his judicial career, but before the recent cases commencing with *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442, followed by *Rhyner v. Menasha,* 107 Wis. 201, 83 N. W. 303, and *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26, wherein this court has indicated more at large than formerly the proper method of submitting cases when special verdicts are demanded.

Many other assignments of error are predicated upon details of the trial and submission of the case, but need not be discussed, nor decision thereon announced, in view of the conclusion we have reached upon the merits. From what has already been said thereon, we must hold that the trial court erred in refusing to direct a verdict for defendant and in denying the motion to set aside the verdict and grant a new trial, and from such errors reversal follows.

By the Court.—Judgment reversed, and cause remanded for a new trial.

SMITH, Appellant, vs. NORTON, Respondent.

April 24—May 13, 1902.

(1) *Justices' courts: Appeal: Judgment without new trial.* (2) *Attorney and client: Compensation.*

1. The provision in sec. 3769, Stats. 1898, that upon the hearing of an appeal from a justice, where there is no new trial, "the appellate court shall give judgment according to the weight of the evidence and the justice of the case . . . without regard to the finding of the justice," does not mean that the evidence must be construed most strongly in favor of the losing party.
2. In an action by an attorney to recover for services, where defendant denied liability and alleged payment, the evidence (stated in the opinion) is *held* to justify a finding for defendant.

APPEAL from a judgment of the county court of Fond du Lac county: A. E. RICHTER, Judge. *Affirmed.*

For the appellant there was a brief by *Charles D. Smith* in person, and oral argument by *J. B. Sanborn.*

For the respondent the cause was submitted on the brief of *J. M. Gooding.*

CASSODAY, C. J. It appears from the record that May 4, 1900, the plaintiff commenced an action before a justice of the peace to recover $35 as the reasonable value of legal and other services rendered by the plaintiff for the defendant at his instance and request during the months of August, September, and October, 1899. The defendant, by way of answer, denied liability and pleaded payment. On the trial before the justice the testimony of the plaintiff tended to support his claim, and was to the effect that his services were rendered in an effort to free the defendant's lands of incumbrances; that in doing so he once went to Rosendale with the plaintiff, ten miles distant, and once went to Milwaukee to try to obtain a loan; that the defendant wanted a loan of $5,000, but that he failed to obtain any loan. On such trial

the defendant gave evidence to the effect that in August, 1899, he first saw the plaintiff and told him that he would like to raise from $2,500 to $5,000 for purposes mentioned, and that he would give any one who would get him the money one per cent. for doing so; that the plaintiff said he thought he could get the money, and that he then told the plaintiff that he would not give him a cent unless he got the money; that the plaintiff then undertook to get the money, but failed to do so; that he never made the plaintiff any other offer; that the plaintiff went with him to Rosendale, and he offered to pay the plaintiff in cash for his trouble, but the plaintiff said, "Never mind; bring me some oats some time;" that he did deliver the plaintiff two bags of oats, five or six bushels, and the plaintiff said that was enough. There was some evidence tending to corroborate the defendant. The plaintiff admits that he received three bushels of oats from the defendant, but says he "did not tell him that it was all right."

At the close of the trial the justice found in favor of the defendant, and taxed his costs against the plaintiff at $11.18, and rendered judgment accordingly. The plaintiff gave the requisite notice of appeal from that judgment to the county court, together with an affidavit that the appeal was made in good faith, and not for the purpose of delay, as prescribed by sec. 3754, Stats. 1898, but did not file any affidavit, as prescribed by subd. 2, sec. 3768, and hence the cause was necessarily heard in the county court "on the original papers and the return of the justice." Sec. 3767.

True, as claimed by the plaintiff, the statute declares that upon the hearing of such an appeal "the appellate court shall give judgment according to the weight of the evidence and the justice of the case, . . . without regard to the finding of the justice." Sec. 3769, Stats. 1898; *Silvernail v. Rust,* 88 Wis. 458, 60 N. W. 787; *Fintel v. Cook,* 88 Wis. 485, 60 N. W. 788. But this does not mean that the evidence returned must be construed most strongly in favor of the

losing party. The question presented is purely one of fact. The justice who saw and heard the witnesses found for the defendant. He undoubtedly did so because he thought such finding was in accordance with the weight of the evidence. The evidence returned seems to justify such finding. The county court affirmed that judgment. Notwithstanding the language of the statute, we must concur in such finding.

By the Court.—The judgment of the county court of Fond du Lac county is affirmed.

PATNODE, Respondent, vs. WESTENHAVER and others, Appellants.

April 25—May 13, 1902.

Conspiracy: Evidence: Court and jury: Obtaining property by false promise of marriage: Mutual abandonment of engagement: Ratification of fraudulent transaction: Causes of action: Special verdict: Instructions to jury.

1. An express agreement between the conspirators is not essential to an actionable conspiracy. It is enough if there is a tacit concurrence in mental intent to effect the common purpose.
2. In an action by a widow for damages alleged to have been caused by the formation and execution of a conspiracy to obtain her property through false promises of marriage made by one of the defendants, the evidence, though circumstantial, is *held* sufficient to warrant the submission to the jury of the question of the existence of such conspiracy.
3. Plaintiff had conveyed real estate to one of the defendants, taking his notes for a part of the purchase price, and had then given back to him one of such notes for $1,500. She testified that it was her purpose to give him $1,500, not a specific part of the realty as such, and that to effect such purpose she took from him the note as a security of the value of $1,500, and then delivered it to him as a gift for that amount and in view of her expectation to become his wife, the understanding between the two being that the property was to be enjoyed by them mutually. *Held*, that the credibility of such testimony was for the

jury, although it was not consistent with many things in letters written by her to him while she was infatuated with him and under his influence.

4. The fact that, after the alleged breaking of the engagement of one of the defendants to marry her, plaintiff followed his advice and married another man, and thereafter expressed satisfaction with having gained a protector and a home, does not show an abandonment of the engagement by mutual agreement, there being evidence that plaintiff was so under defendant's influence that in what she did she executed his will, not her own.
5. The bringing of an action by plaintiff against one of the defendants to recover the amount of one of the notes given by him for a part of the purchase price of her real property, did not preclude her from afterwards maintaining this action against all the defendants for damages caused by the execution of the fraudulent conspiracy.
6. In a case where five questions would have covered all the issues of fact, the submission for a special verdict of twenty questions—some referring to matters not in dispute, some to mere evidentiary matters, some mere repetition in whole or in part of others, some containing elements in the alternative so as to confuse the jury and render an affirmative or negative answer inconclusive as to any material point, and some suggesting to the jury prejudicial circumstances of which there was no evidence,—is *held* to have been a material error.
7. It is error in submitting a special verdict to inform the jury how questions must be answered in order to enable plaintiff to recover.
8. *Per* MARSHALL, J., speaking independently. An instruction that if the jury are satisfied that any witness intentionally testified falsely as to any material fact, then, although not bound to disbelieve all his testimony, they are at liberty to do so, excepting in so far as such testimony is corroborated by other credible evidence or by facts and circumstances, is criticised as leaving room for the idea that the testimony of such witness could not be rejected if corroborated. The approved method of stating the rule is: 'If you believe that any witness has testified wilfully false as to any material matter in the case, you may properly, but are not bound to, on that ground alone, reject all of his evidence not corroborated by some other credible evidence.'

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action for damages caused, as alleged, by the formation and execution of a conspiracy to defraud the plaintiff. The substance of the complaint is as follows:

On April 8, 1896, plaintiff owned a certain lot, described, in Kewaunee, Kewaunee county, Wisconsin. She was then and had been for some time prior thereto an unmarried woman over twenty-one years of age. Defendant *Hulbert* at the same time was an unmarried man over twenty-one years of age, and defendants *Westenhaver* were husband and wife, the wife being *Hulbert's* sister. Before the day named defendants agreed between themselves to fraudulently deprive plaintiff of her property or some part of it in this wise: *Hulbert* was to induce plaintiff to convey part or all of her property to him by promising to take her as his wife and inducing her to believe the promise to be made in good faith, in fact having no such purpose, and if she showed a disposition subsequently to obtain redress, defendants were to intimidate her, by threats of publicly attacking her moral character, not to do so. Pursuant to such agreement *Hulbert* made love to plaintiff, the *Westenhavers* encouraging his suit, resulting in plaintiff's becoming completely infatuated with him and their exchanging mutual promises of marriage. Thereafter all the defendants co-operated in influencing plaintiff to start *Hulbert* in business and to give him some of her property in view of the fact that he was soon to become her husband. The result was that she conveyed to him the real estate mentioned, for an expressed consideration of $3,500, only $300 of which was paid, taking for the balance his unsecured note for $1,500, and a note for $1,700 secured by a mortgage on the property. The deed was duly recorded and she gave *Hulbert* the $1,500 note. Subsequently, in further execution of the conspiracy, plaintiff was induced to turn over to *Hulbert* the $1,700 note and mortgage, it being suggested to her, by him and *Westenhaver,* that it would not look well for the public records to show a

mortgage in her favor on property owned by her prospective husband, and *Hulbert* further suggesting that she ought to take his word for the payment of the money, under the circumstances. Subsequently, in further execution of the conspiracy, *Hulbert* repudiated his promise to marry plaintiff, assigning as a reason therefor that his relatives, particularly the *Westenhavers,* were opposed to the union because of the disparity between their ages, but he refused to give back to plaintiff any part of the property obtained as aforesaid.

At the time of the occurrences mentioned plaintiff was the widow of one Roberts. Subsequently she became the wife of one Patnode, whose name she now bears. After the marriage to Patnode, defendants, in order to prevent her from seeking redress for the wrongs done by them as aforesaid, and as a part of the design formed at the beginning, charged her with being guilty of various offenses and threatened to expose her to public hatred and scorn and to cause her husband to abandon her; and about the same time the *Westenhavers* importuned her to leave her husband and live with them if the latter made any trouble about the property.

The damage claimed is the value of the $1;500 note, with interest thereon from April 8, 1896.

Hulbert answered denying all the charges against him of wrong-doing, and alleged that all the transactions between him and the plaintiff in regard to the property were free and voluntary on her part; that he paid plaintiff $300, and that the balance in value of the real estate was voluntarily given to him by plaintiff; that such value was first put in the form of an indebtedness to plaintiff on a $1,500 note and a $1,700 note, by her request, to deceive her relatives as to the nature of the transaction; that it was her intention, when the property was conveyed and the notes were given to her, to turn them over to him after they had served their purpose of deceiving her relatives, and that such plan was carried out. He pleaded in bar of the prosecution of this action the pendency

of an action previously commenced against him by plaintiff on contract to recover on the $1,700 note, upon the theory that it was given to him for safe-keeping and not as his own property.

The controverted issues upon the evidence relate to whether plaintiff gave her property to *Hulbert* as claimed in his answer, or he secured it under a promise of marriage pursuant to a fraudulent combination between him and his co-defendants. The cause was submitted to the jury for a special verdict, with the following result:

"1. On or about April 1, 1896, did the plaintiff, *Lizzie C. Patnode* (whose name was then *Lizzie C. Roberts)* and the defendant, *Harvey L. Hulbert,* each promise and agree to marry the other? *A.* Yes.

"2. On or about April 8, 1896, did the plaintiff convey to said *Hulbert,* free and clear of incumbrances, her real estate described as the south sixty feet of lots one and two, in block six, in the city and county of Kewaunee, Wisconsin? *A.* (By the court) Yes.

"3. What was the fair and reasonable value of said real estate on April 8, 1896? *A.* $3,500.

"4. As the consideration for the conveyance to him of said real estate, did said *Hulbert,* at the date thereof, pay to plaintiff $300 and execute and deliver to her his promissory note to secure payment to her of the further sum of $1,500, and also his promissory note together with a mortgage of said real estate to secure the payment to plaintiff of the further sum of $1,700? *A.* Yes.

"5. On April 8, 1896, after said note for $1,500 had been delivered to plaintiff, did she give back and surrender the same to said *Hulbert,* at his request, and upon the condition and understanding that he and plaintiff were to beceme husband and wife? *A.* Yes.

"6. If your answer to the fifth question be 'No,' then state whether said $1,500 was given back to said *Hulbert* as a present or gift to him from plaintiff, without condition or understanding that they were to become husband and wife?

"7. On or about August 7, 1896, did said *Hulbert* obtain from plaintiff the return and surrender to him of said note

and mortgage which secured payment of $1,700? *A.* (By the court) Yes.

"8. Was the return of said last-mentioned note and mortgage to said *Hulbert* obtained by persuasion addressed by himself and said *Henry Westenhaver* to plaintiff, to the effect that it would not look well for her to hold or to place on record a mortgage against her intended husband; and upon the promise of said *Hulbert* that on plaintiff's demand at any time, he would deliver back to her said mortgage and the note given therewith, or pay to her the money thereby secured? *A.* Yes.

"10. Did the plaintiff surrender said last mentioned note and mortgage to said *Hulbert* as a gift or present to him, without being thereunto advised or persuaded by himself and said *Henry Westenhaver,* and without any understanding that said *Hulbert* should marry plaintiff, and without any promise on his part to return to her the note and mortgage or to pay the money thereby secured? *A.* No.

"11. Has said *Hulbert* made any payment of money to apply on said $1,500 note, and if so how much has he paid? *A.* (By the court) No.

"12. Has said *Hulbert* made any payment of money to apply on said $1,700 note and mortgage, and if so how much has he paid thereon? *A.* No.

"13. Before this action was begun, did plaintiff demand of said *Hulbert* the return or payment to her of said $1,500 note, and did he fail or refuse to comply with such demand? *A.* Yes.

"14. Before this action was begun, did plaintiff demand of said *Hulbert* the return or payment to her of said $1,700 note and mortgage, and did he fail and refuse to comply with such demand? *A.* Yes.

"15. If you find that plaintiff and said *Hulbert* promised to marry each other, did he make such promise in good faith, with the intention to marry plaintiff? *A.* No.

"16. If you find that *Hulbert* promised to marry plaintiff and did not intend to marry her, then answer this question: Was his promise to marry plaintiff made by said *Hulbert* with the fraudulent design and purpose on his part of thereby acquiring over her an influence and control by which he could induce her to transfer her property to him, for a nominal or

inadequate consideration, or by way of gift, and thereby to cheat and defraud plaintiff out of her property? *A.* Yes.

"17. Did the defendants, *Harvey Hulbert, Henry Westenhaver,* and *Ally Westenhaver,* his wife, fraudulently and unlawfully combine and conspire together to cheat and defraud plaintiff out of her property by a scheme substantially as follows, to wit: that said *Hulbert* should court and make love to plaintiff, and lead her to believe that he was intent on marrying her; that he should become engaged to marry her; that by means of the influence and control which the marriage engagement would enable said *Hulbert* to acquire over plaintiff, he should induce her to transfer her property to him without any, or for an inadequate or nominal, consideration; that he should then break the engagement and refuse to marry plaintiff; and that, if she should then seek to recover back her property, the defendants should charge plaintiff with unchastity and threaten to expose and disgrace her, and thereby frighten and prevent her from making any attempt to regain her property from said *Hulbert?* *A.* Yes.

"18. If your answer to the seventeenth question be 'Yes,' then answer this question:

"In carrying out and putting such conspiracy into effect, was plaintiff requested and induced by said *Hulbert,* and prompted, advised, and encouraged by said *Henry Westenhaver* and *Ally Westenhaver,* to become engaged to marry *Hulbert,* and to convey to him said real estate, and to surrender up to him said promissory notes and mortgage, all with the intent and for the purpose, on the part of the defendants, thereby to cheat and defraud the plaintiff out of her property, and especially out of said $1,500 note? *A.* Yes.

"19. What was the fair and reasonable value of said $1,500 note, as a security on the day of its date? *A.* (By the court) $1,500.

"20. Did the defendants, on April 8, 1896, through and by means of a pre-arranged plan, including professions of love, affection and a promise of marriage, fraudulently and insincerely made by said *Hulbert* to the plaintiff, induce her to give the $1,500 note to him to be destroyed? *A.* Yes.

"21. In August, 1896, or at about that time, and after plaintiff had delivered back to *Hulbert* said mortgage and both of said notes, did he inform her at Milwaukee that he would not marry her? *A.* Yes."

Such proceedings were thereafter taken that judgment upon the verdict was rendered in favor of plaintiff.

For the appellants there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there was a brief by *John Wattawa,* attorney, and *Nash & Nash,* of counsel, and oral argument by *L. J. Nash.*

MARSHALL, J. Counsel for appellants assign six grounds for a reversal of the judgment, each of which has received consideration. We will take them up in the order in which they appear in counsel's printed argument, stating them in the form of propositions the affirmative of which counsel maintain, and discuss such of the claims under each head as appear to have sufficient merit to require it.

1. Did the trial court err in not directing a verdict for defendants as requested? That is submitted under subheads as follows:

(a) "There is an absolute failure of evidence to establish a conspiracy." The act of combining together, by two or more persons, essential to an actionable conspiracy, is not usually, if at all, established by direct evidence. If that were necessary in order to punish such wrongdoing, judicial remedies to that end would be exceedingly inefficient. There is a high degree of moral turpitude involved in the deliberation and calculation by guilty parties as to purposes and means, characterizing unlawful combinations to injure, which instinctively inspires secrecy. Therefore, existence of the element of combination is, peculiarly, a matter for proof by circumstantial evidence. Such evidence was respondent's sole reliance in this case. Here are the circumstances disclosed, mentioning evidentiary facts as established which direct evidence tends to establish. Obviously we must so view the record in determining whether the court erred in submitting the issues involved to the jury.

Hulbert was about twenty-seven and plaintiff thirty-seven years of age at the time of the alleged wrongful acts. He was a man of more than ordinary experience for one of his years. He had been in business in Chicago and several other places. He was accomplished as a pharmacist, a man of pleasing address, inclined to social pleasures, and of conscious ability to gain the confidence of, and exercise mental control over, a woman of plaintiff's temperament. She was a woman of more than ordinary ability in business affairs, but was uneducated. She was of an exceptionally confiding disposition, and readily yielded consent to the suggestions of a person of the opposite sex who stood near her in daily association, and whom she had reason to expect she might gain for a husband. Her desire for the matrimonial state was so abnormal as to exclude from her thoughts all interfering tendencies, inclining her, apparently, without moral or intellectual power of resistance, to sacrifice all her possessions for even the pleasure of indulging in the hope of its attainment. Her temperament and disposition, as stated, was well understood by all the defendants. Though her weakness was obvious to them, and persons circumstanced toward her as they were would ordinarily have made some effort to restrain and advise her, their conduct was to the contrary.

Plaintiff was married quite early in life to Christian Roberts, a druggist who kept a store at Kewaunee, Wisconsin. He owned the lot where the business was carried on. It was his homestead. He and his wife lived over the store till he died in 1891. He left all his property to her. She had lived over the store, in all, some fifteen years, and had aided in carrying on the drug business. Defendant *Henry Westenhaver* purchased the drug business, but not the store building, in 1895, placing *Hulbert* in immediate charge thereof, who, with the aid of plaintiff, conducted the same for several weeks thereafter. At the end of that time the *Westenhavers* moved to Kewaunee and *Henry Westenhaver* took charge of the drug

business. It was carried on, thereafter, under his personal charge, with the aid of *Hulbert* and plaintiff as clerks, till about August, 1896, *Hulbert* being advertised as his partner. *Hulbert* was a brother of *Mrs. Westenhaver.* Soon after he and plaintiff became associated together in the drug business, she indicated a high regard for him and he commenced paying attention to her in a way to give her hope that he had matrimony in view. About January 1, 1896, he made a proposal of marriage to her, to which she did not respond. The close relations between the two were well known to the *Westenhavers.* For several months subsequent to the 1st day of January mentioned, they were very much in each other's company. She became blindly attached to him and he led her to believe that in great measure he reciprocated such attachment. In March, 1896, she was influenced by her father to meet one Winkler in Milwaukee, he desiring her to become Winkler's wife because he was a man of property. She did not take kindly to her father's plan in that regard because the execution thereof might separate her from *Hulbert.* While on the trip to Milwaukee she wrote letters to *Hulbert* indicating that she would not marry Winkler unless he, *Hulbert,* wished her to; that she loved and could love only him. She addressed him in the most endearing of terms; "My dear *Harvie,*" and "My own dear *Harvie,*" being favorite expressions. She closed her letters with the same indications of warm attachment; "Your *Lizzie,*" "Lots of love and kisses from your *Lizzie,*" being forms of expression used. In such letters she said to him that language was not adequate to express the depths of her love for him; that it was incomparably more intense than the love she had for her husband in his lifetime; that she could not live without him; that if he did not reciprocate her attachment she would turn over all her possessions to him and bid good-bye to the world and to life, as there would be to her nothing worth living for; that if his love for her was as warm as hers for him, they

would never have to part; that when she returned they would have boundless pleasure in honey and kisses.

She returned to Kewaunee as free as she went away on the excursion to see Winkler. She was met at the train by the *Westenhavers* and induced by them to go to their home to spend the night. They knew of the purpose of her trip to Milwaukee and of the result of it. All the parties to the action spent the night after her return at the *Westenhaver* home. After the *Westenhavers* had retired for the night, *Hulbert* and plaintiff talked over the Milwaukee excursion. He expressed pleasure that the trip had turned out a failure, as he wanted her for his wife. Before they parted for the night they exchanged pledges to enter the marriage state with each other. The next day or thereabouts he secured an interview with her, apparently for the purpose of suggesting, as he in fact did, that she should, in view of their prospective marriage, give him a share of her property. Soon thereafter all the parties to the action met at the *Westenhaver* home. The *Westenhavers* then made known to plaintiff that they were fully informed of her approaching union with *Hulbert,* and they suggested that in view thereof she should help him by transferring to him some of her property. About a week thereafter he again importuned her to give him part of her property, suggesting $1,500 as a satisfactory amount. She assented, with the express understanding that the property would be enjoyed by the two together as husband and wife. Some time before the engagement he obtained an option to purchase the store lot for $3,500, inducing her to give him such option by saying that he wanted to prevent another person, who desired to obtain the property, from buying it, because such an event might interfere with the drug-store business. He agreed in the written option to pay plaintiff $50 for the privilege to buy, but he in fact did not pay her anything, though he held the option till the property was conveyed to him in April, 1896. About the time the option was

obtained, plaintiff was casually interrogated by *Henry Westenhaver* as to her disposition in regard to sharing her property with a husband if she should obtain one, receiving in response expressions to the effect that if she had a husband whom she loved she would be willing to transfer to him all the property she had in the world.

April 8, 1896, *Hulbert* procured the following papers to be prepared for execution: A deed conveying the store lot to him for the expressed consideration of $3,500; a note for $1,700 and a mortgage upon the property to secure the same; a note for $1,500. He took the papers to the drug store, where, in the presence of *Westenhaver,* they were executed and properly delivered, he paying in cash the balance of the consideration for the property required, with his two notes, to make $3,500. After the securities were so executed and delivered, she bestowed upon *Hulbert* the $1,500 note, *Westenhaver* expressing his approval thereof and suggesting that she should destroy the note, which she did by tearing it in pieces, which he and *Hulbert* burned.

A few days after the engagement between plaintiff and *Hulbert,* he purchased for her a marriage engagement ring and himself placed the same on her finger. For several months thereafter the relations between the two, to all outside appearances and so far as plaintiff could discover, were in harmony with a consummation of her matrimonial hopes. They spent much of their time in each other's company. August 7, 1896, when plaintiff was preparing to leave Kewaunee for some time and had it in mind to place her mortgage on record, *Hulbert* suggested to her that a public record of the mortgage would not look well, since they were to be man and wife, and that she had better turn the papers over to him; that he was a man of honor and would give her money whenever she wanted it. She complied with his request. She had received, before that, a similar suggestion from *Westenhaver.*

After *Hulbert* obtained possession of the papers he destroyed them.

Shortly thereafter the attitude of all the defendants toward plaintiff changed. The *Westenhavers* ceased to show the customary regard for her, and *Hulbert* made excuses for not making her his wife. He notified her that he could not do so because of objections raised by his relatives. Plaintiff did not give up hope of yet being his wife, though she renewed her negotiations with Winkler with a view to marrying him and was encouraged by *Hulbert* to do so, he cultivating a belief in her mind that in case of such an event he would be a member of the Winkler family as her son, and that if she should not form a union with Winkler he might yet take her for his wife. The idea of marriage between plaintiff and Winkler was finally abandoned. *Hulbert* did not show any disposition thereafter to take plaintiff for his wife, but urged her to marry Patnode, and she took his advice. At this time she had no home and no property to speak of. Up to the time negotiations with Winkler were broken off, she continued to make protestations of love and affection for *Hulbert,* and he continued to receive the same as proper. The *Westenhavers* were fully informed of all this, and gave no indication to plaintiff of disapproval thereof.

Notwithstanding *Hulbert's* repudiation of his engagement to marry plaintiff, and the impossibility of her desire for association with him being satisfied, by reason of her marriage to Patnode, he refused to return to her any part of the property he received from her. After her union with Patnode she called upon him for the $1,700 note or the money it represented. His reply was that he would have to consult *Westenhaver* about it. All parties met at the *Westenhaver* home, on which occasion *Mrs. Westenhaver* approached plaintiff with something like her former show of affection, and pleaded with plaintiff not to make *Hulbert* any trouble about the property matter. At the same time *Westenhaver*

said that plaintiff should not have a dollar of the property to give to Patnode, and if that caused any trouble between her and her husband she could find a home in his family. Both the *Westenhavers* joined in assuring plaintiff of that.

Summarizing somewhat,—while the engagement existed between plaintiff and *Hulbert,* the *Westenhavers* treated her as a prospective relative; thereafter their attitude changed to one of coldness; later, when there was danger of demands being made upon *Hulbert* to restore the property, they held out to her, as an inducement to not make him trouble, that they would befriend her if property matters caused her any trouble with Patnode. In other ways they sought to influence her not to try to obtain restoration of the property. They were fully informed of her infatuation with *Hulbert,* of her disposition to bestow her property upon him, of her expectation that he would make her his wife, of her subsequent expectation that she could enjoy his company as a son while she was the wife of another. During all the time, their attitude toward her was that of approval and suggestion in the line of her desires. It changed only when they were confronted with the danger that *Hulbert* might be disturbed in the enjoyment of the property he obtained of her.

Enough has been said to show the general features of the case, on the subject of whether there was a conspiracy, as the trial court could reasonably have considered the jury might view the evidence. Many of the matters stated appear by the record beyond dispute. There is evidence therein tending to establish the rest. Now if we were called upon, in order to sustain the ruling of the trial court in submitting the cause to the jury on the subject under discussion, to decide that any express agreement between appellants to defraud respondent is indicated with sufficient clearness to any more than arouse a strong suspicion in that regard, something short of evidencing the existence of a corrupt agreement as within reasonable probabilities, it is not clear but that we would

fail. An agreement, expressly entered into, was not necessary. A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty, actionable combination. Individual intent by two or more persons to do an unlawful act or a lawful act by unlawful means is the first step in that regard. Next follows concurrence between such individuals, not concurrence of action, merely (*U. S. v. Barrett* [C. C.] 65 Fed. 62), but concurrence in mental intent to effect the common purpose, each to aid the others in that regard. Mutuality in the undertaking may be secured without any express agreement and without a spoken or written word between the conspirators or a meeting of the members of the combine, or their, even, all knowing each other; or the precise thing to be accomplished or plans for its accomplishment, either in a general way or in detail, being distinctly stated by any member of the combine to any other member. If there is a meeting of minds, brought about in any way, to accomplish the common purpose, the essentials of a guilty combination are all satisfied. *Spies v. People,* 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *Gibson v. State,* 89 Ala. 121, 8 South. 98; *U. S. v. Goldberg,* 7 Biss. 175; *People v. Mather,* 4 Wend. 229; *U. S. v. Babcock,* 3 Dill. 585. Applying those principles to the facts here we cannot say but that they indicate a guilty combination to defraud plaintiff substantially as claimed, within reasonable probabilities.

A different view from the foregoing might be taken from the evidence. By this we mean that the inferences from the evidence are not all one way, yet we venture to say that in the history of jurisprudence persons have been convicted and executed as being guilty participants in a criminal conspiracy on weaker evidence. True, assuming that the relations between respondent and *Hulbert* were what she claims, her negotiations with Winkler, both before and after her engagement with *Hulbert,* are hard to understand. They indicate that her mind was unbalanced to the point or beyond that of

irresponsibility, or that she wilfully disregarded the moral requirements of the social state. But the evidence of her complete subjugation to *Hulbert* is too strong to be overcome by her singular conduct as regards Winkler even when aided by her quick union with Patnode after negotiations with Winkler had been abandoned. If respondent testified to the truth as to her relations with *Hulbert,* the conduct of all the defendants as regards the affair with Winkler is only explainable upon the theory that they realized that she was completely under *Hulbert's* influence and thought to cultivate her infatuation for him for some temporary purpose and at the same time to allow full play to her weakness, possibly to encourage it as regards Winkler, as a means of ridding themselves of her when the object of their scheme had been attained. The whole conduct of defendants is so inconsistent with honesty and good morals that it cannot be easily accounted for without an ulterior motive common to all. It is reasonable to conclude that the acquirement of respondent's property was such motive, and that it fully explains all their operations in view of the low plane upon which the undisputed evidence shows they reasoned and acted.

(b) 'The $1,500 note had no value. It was a mere blind to veil the real transaction, which was a gift of the realty to *Hulbert.* Further, if it was ever in the possession of respondent as a thing of value, it was thereafter bestowed upon *Hulbert* as a gift.' Those suggestions of appellant's counsel do not seem to possess sufficient merit to warrant any extended discussion. There is ample evidence that respondent's purpose, when she transferred the real estate to *Hulbert,* was to give him $1,500, not a specific part of the realty as such; that, in order to effect such purpose, she took from him the note, not as a mere valueless piece of paper, but as a security of the value of $1,500, and then delivered the same to him as a gift for that amount, and in view of her expectation to become his wife, the understanding between the two being that the

property was to be enjoyed by them mutually. It is useless to contend there is no evidence of that, since the respondent so testified and her evidence is not, as we have before indicated, so incredible that it can be entirely disregarded. True, it is not consistent with many things said in her letters, but what part to reject and what part to believe under the circumstances was a jury question. The rule that the positive evidence of a witness, when opposed by all reasonable probabilities, is not worthy of belief by court or jury, does not apply to such a situation. The condition of mind in which the respondent was at the time she wrote the letters, as indicated therein, justifies careful search for some explanation of expressions used by her not, at all points, indicated by the literal sense of her language. In their literal sense they are very contradictory. In one respondent wrote as if she had given *Hulbert* but $1,500. In another she wrote about having given the entire property in the store lot and building to him. In another her language indicates that she had given him the $1,700 note, nothing being said about the $1,500 note. All the letters are worded in a vein of insane infatuation with him. It is not unreasonable to regard her evidence, given after she was rescued from his influence, as most likely to indicate the real truth. There is some reason in the idea that she gave her property to him and that he received it under the circumstances testified to by her, but none in the idea that her love for him was of the character which the language of her letters indicates, and that she gave up her property to him only thinking to secure or retain his love as that of a son.

(c) 'The engagement, if there were one, was mutually abandoned.' Counsel contend for that because after respondent claims the engagement was broken, she followed *Hulbert's* advice by marrying Patnode, and expressed satisfaction, under the circumstances, with having thus gained a protector whom she respected and a home which she stood sorely in need of. We are unable to see in that any abandon-

ment of the engagement by mutual agreement. It is entirely consistent with her having been coerced into a position where the marriage with Patnode was, apparently to her, the only way of securing support and a home. It rather indicates mere blind submission to what she could not help; that she was so completely under *Hulbert's* influence as to be a mere victim of his suggestion. It is reasonable to look at the evidence that way. There is strong proof that she was so under his influence that in what she did she executed his will, not her own. When he suggested negotiations with Winkler, her mental balance inclined that way. When he suggested marriage with himself, she was in immediate harmony with that view. When he suggested turning over her property to him, there was the same harmony of minds. When he notified her that he could not keep his engagement with her, she accepted that situation, protesting still the most unspeakable love for him, which condition of her mind was in harmony with his purpose. When it accorded with his plans for her to reopen negotiations with Winkler, she inclined that way. When he advised her to end her troubles by marrying Patnode, she blindly followed that suggestion. In short, her every act, from the time her associations with him commenced till she married Patnode, seems to have been in harmony with his wishes, and without enough mental resistance by her at any point to evidence that she had a will of her own.

(d) At this point counsel reassert that there is no evidence of any conspiracy. That subject has been fully treated in what has already been said.

(e) 'Respondent having sought to recover the amount of the $1,700 note by an action on contract, she ratified the transaction whereby she conveyed her property to *Hulbert*, precluding her from changing her position and maintaining an action sounding in tort for damages for a conspiracy.' In submitting that proposition, counsel seem to have misconceived the nature of this action. The gist thereof is the

damage suffered by a wrong which was distinct from other wrongs which were in a measure incidental thereto. No damages necessarily resulted from the mere sale of the real estate, nor by the delivery to respondent of the $1,700 note and mortgage for safe-keeping. His obligation to pay the debt represented by such securities was not affected by the wrongful destruction of them or by their wrongful retention by him. If in the execution of a fraudulent conspiracy the victim is induced to make several contracts or part with several things of value, it is by no means necessary for him to repudiate all of the incidental transactions in order to save the cause of action for damages against the members of the combine. The cause of action for the conspiracy in such circumstances is a possession by itself, a right to prosecute for the damages caused by the executed fraudulent combination. That cannot be split up. It must be enforced in a single suit. For example, if one is induced by a fraudulent conspiracy to sell two things of value for much less than they are reasonably worth, taking the promise of one member of the combine or all of them to pay the agreed consideration, which promise is thereafter breached, at least two distinct wrongs are involved, and two distinct causes of action accrue. The execution of the fraudulent conspiracy is one of them; the breach of the agreement to pay the stipulated consideration for the property is the other. The former cannot be split up and one action brought to recover the damages suffered as to one piece of property and a separate action brought for damages suffered as to the other. Neither is that action extinguished or waived by a suit upon the promise to pay. An action upon that promise, and one for damages for the loss brought about by the conspiracy—the difference between the sale price of the property and its reasonable value—are consistent with each other. They both ratify the sale. In the situation of the parties here, neither the action to recover for the $1,700 note nor the action for damages suffered by respondent in the loss of the $1,500

note repudiates the sale of the realty. If we look at all the mischief as growing out of a single wrong, still it must be remembered that it is not the prosecution of two causes of action in such circumstances that is prohibited by law, but the splitting up of causes of action and the prosecution of inconsistent causes of action. It often happens that there are two causes of action for the same wrong, each standing for a distinct right. If they are inconsistent only one can be enjoyed. If they are consistent, all may be followed, if identity of parties does not exist, effecting a merger, though one, or either, proceeding to a satisfaction, might furnish complete redress, and at the point of satisfaction would extinguish the other. *Barth v. Loeffelholtz,* 108 Wis. 562, 84 N. W. 846; *Clausen v. Head,* 110 Wis. 405, 85 N. W. 1028. The right to redress for damages caused by a consummated conspiracy is distinct, so to speak, from the right to redress for wrongs caused in the progress of its execution. It may go against all the members of the combine, and there may be incidental transactions causing damage included in the claim against all, from which causes of action may arise against individual members of the combine. The prosecution of all for the conspiracy may proceed concurrently with the prosecution of one or more members of the combine liable for some element of the damage in another form of action, up to the point of satisfaction, at which point the element satisfied drops out, as there can be but one satisfaction for the same element of damage.

Applying what has been said to this cause, in any view we may take of the $1,700 note, the prosecution of the action against *Hulbert* for that did not interfere with the prosecution against all the defendants for damages for the conspiracy. All the defendants might be found guilty in the latter action for damages, including the $1,700 note, and *Hulbert* be found liable in an action on the note, in which case one satisfaction covering such element would eliminate it from both actions.

2. Did the court err in respect to the form and contents of the special verdict? That must be answered in the affirma-

tive. The manner in which a special verdict should be framed has been so often, so recently, and so fully stated that we cannot reasonably expect, by further discussing the subject, to eradicate the false notions of the statute in respect thereto evidenced by the verdict in this case. We will refer to the significant previous treatments of the matter and suggest, as we have done before, the importance of a careful study of the same. *Eberhardt v. Sanger,* 51 Wis. 72, 8 N. W. 111; *Montreal River L. Co. v. Mihills,* 80 Wis. 540, 50 N. W. 507; *Haley v. Jump River L. Co.* 81 Wis. 412, 51 N. W. 321, 956; *Ohlweiler v. Lohmann,* 88 Wis. 75, 59 N. W. 678; *Farley v. C., M. & St. P. R. Co.* 89 Wis. 206, 61 N. W. 769; *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Louis F. Fromer & Co. v. Stanley,* 95 Wis. 56, 69 N. W. 820; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816. Instead of submitting to the jury the few questions—each covering concisely, plainly, and briefly a single fact in issue raised by the pleadings and controverted on the evidence—necessary to include all such issues, which, we will say in passing, do not exceed five, the verdict was made up of twenty questions, some referring to matters not in dispute, some to mere evidentiary matters, some were mere repetitions in whole or in part of others, some contained elements in the alternative so as to confuse the jury and render an affirmative or negative answer inconclusive as to any material point, and some contained elements suggesting to the jury prejudicial circumstances of which there was no evidence. For the single basic issue of fact which might have been stated as follows: "Did defendants confederate together to have *Hulbert* enter into an agreement with plaintiff to marry her, use his position as her intended husband to induce her to give him at least part of her property, and to then abandon her?" the court gave this to the jury:

"Did the defendants *Harvey Hulbert, Henry Westenhaver,* and *Ally Westenhaver,* his wife, fraudulently and unlawfully

combine and conspire together to cheat and defraud plaintiff out of her property by a scheme substantially as follows, to wit: That said *Hulbert* should court and make love to plaintiff and lead her to believe that he was intent on marrying her; that he should become engaged to marry her; that by means of the influence and control which the marriage engagement would enable said *Hulbert* to acquire over plaintiff, he should induce her to transfer her property to him without any, or for an inadequate or nominal, consideration; that he should then break the engagement and refuse to marry plaintiff; and that, if she should then seek to recover back her property, the defendants should charge plaintiff with unchastity and threaten to expose and disgrace her, and thereby frighten and prevent her from making any attempt to regain her property from said *Hulbert?*"

By stating all the details set out in the complaint as to the manner the alleged fraudulent scheme was to be carried out, the court suggested the existence of evidence as to each of them. There was none whatever respecting any agreement to charge plaintiff with unchastity and to threaten to expose and disgrace her and to thereby prevent her from endeavoring to recover her property from *Hulbert;* yet, by the answer to the question, the jury found that there was. That indicates, clearly, that they were either misled by the question, or that they were perverse; which of the two we are unable to say. The conspiracy to rob plaintiff may have been formed and some one of the details alleged to have been agreed upon not have been included in the understanding, and not have been essential to plaintiff's right to recover. All the alleged details having been made a part of the question, while as to one, a matter of considerable significance bearing on the real point in issue, there was no evidence, it did not admit of a direct answer for or against the appellants. It admitted only of an answer in their favor. The answer the other way, as before indicated, showed that the jury did not understand the question at all or that they purposed to find for respondent

regardless of the evidence. The result is that there is no reliable finding on the initial question in the case.

Much ground might be covered in analyzing the verdict question by question and showing the useless and prejudicial features thereof, but we forego doing that because it has been covered in principle in the cases cited, particularly in *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816. The court has often criticised special verdicts, severely, for faults in matters of form where no reversible error was found, hoping to secure a better administration of the special verdict statute. It is feared that the frequency with which judgments have been affirmed notwithstanding defects of form in special verdicts, it being suggested that trial courts have a wide discretion as regards the questions to be submitted for such a verdict, has led to the belief, to some extent at least, that there can be no prejudicial error in such matters. If such be the fact, there can be no better opportunity to correct it than in this case, with twenty questions for a verdict, consisting of nearly a thousand words, only five at the most being needed, which might be clearly expressed in seventy-five to a hundred words. A special verdict may be framed with so many needless questions covering undisputed matters and matters of mere evidence, and questions covering the same facts in different forms, as to obscure the few facts in issue,—turning a statute, intended to be a valuable aid in arriving at the truth as regards the rights of parties, so as to have the very opposite effect. It is considered that we have a striking example of such contrary effect in this case. The purpose of a special verdict is not, as seems to be supposed by some, to enable parties to cross-question the jury and make disclosures as to their mental operations in reaching conclusions upon the turning facts in a case, or to test the intelligence of the jury by an exhibition as to whether they so fully comprehend the case as to be able to find their way through a labyrinth of questions by a consistent line. Instead of framing a special verdict so as

to set a trap for the jury or compel them to grope their way through a mass of useless questions, so far as ultimate facts are concerned, the study should always he how to state the ultimate controverted questions of fact—facts necessary, from the standpoint of good pleading, to make out a cause of action—so that each proposition may be expressed in as few words as can practicably be used and yet make the matter clear to the ordinary lay mind; and how to state the propositions so that each will be perfect and exclusive, not a restatement in whole or in part of any other proposition, and so that each will admit of a direct answer one way or the other. Where the statute says, "A special verdict is that by which the jury find the facts only, leaving the judgment for the court" (sec. 2857, Stats. 1898), the word "facts" means ultimate facts,—those upon which the case turns as a matter of law. The language of sec. 2858, "Such verdict shall be . . . in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer," refers to issues of fact essential to the cause of action or defense from the standpoint of good pleading, and expressly prohibits all other matters. The aim of the statute is to enable the court to focus the mental operations of the jury upon the turning points in a case, avoiding the danger present in taking a general verdict of the law being applied to facts, in form, without any precedent finding of facts. Instead of the benefits of the statutes being enjoyed by the parties to this litigation, the attention of the jury being focused upon the few essential disputed matters, it was directed to a mass of things, so that in the end there was no such verdict as the law requires. True, the court has a wide discretionary power, as has often been said, in the framing of a special verdict. That discretion, however, goes to the manner of submitting questions covering the issues which the statute requires to be presented by the verdict, not to obscuring them by joining with them a mass of questions, which the statute expressly prohibits. A violation

of the statute by including irrelevant matters in the verdict is not necessarily reversible error. It may be deemed harmless under sec. 2829, Stats. 1898. But when such errors go to the extent of denying the privilege of the special verdict statute, they affect substantial rights and constitute reversible error. It is considered that the verdict in question falls under that condemnation.

3. Did the court err in its instructions to the jury? Counsel for appellants complain of this language used in regard to the question submitted, intended to cover the issue as to the formation of a conspiracy, to which we have referred at some length:

"It is not enough for the plaintiff to show that the conspiracy alleged in her complaint was formed and existed and that in the execution of it she was defrauded out of her property, if that was the fact. . . . The plaintiff cannot succeed in this action unless she proves to your satisfaction by a clear preponderance of the evidence that the $1,500 note was obtained from her by *Hulbert* through a conspiracy and in the execution of it; and unless she makes that proof in that degree you must answer that question 'No;' but if she does, your answer to it should be 'Yes.' "

In that the court seems to have industriously informed the jury not only how to answer the particular question the instruction was directed to, but the one which preceded it, in order to enable the plaintiff to recover. That method of instructing a jury, in taking a special verdict, is so clearly destructive of the rights of parties to the benefits of the special verdict statute, as to have come to be regarded as prejudicial error almost as a matter of course. *New Home S. M. Co. v. Simon,* 104 Wis. 120, 80 N. W. 71; *Sheppard v. Rosenkrans,* 109 Wis. 58, 85 N. W. 199; *Musbach v. Wis. Chair Co.* 108 Wis. 57, 84 N. W. 36.

Some matters are presented by appellants' counsel for consideration, to which we have not referred specially if at all; but since they are either not prejudicial to appellants, or be-

cause of what has been said upon other points they are not liable to occur on another trial, it does not seem that anything further need be said to prevent a recurrence of anything of a prejudicial nature, disclosed by the record, which is complained of.

By the Court.—The judgment is reversed and the cause remanded for a new trial.

MARSHALL, J. (speaking independently). There is one matter presented for consideration in the brief of appellants' counsel, not mentioned in the opinion of the court, which seems to me ought not to be passed over without some expression of judicial views in respect to it, even though they do not go on record with the indorsement of the court. Want of indorsement does not always mean absence of concurrence in what is said on a subject as much as want of harmony respecting the necessity for treating it. In this connection we should say, to avoid misapprehension, that the instruction hereafter mentioned is deemed by my brethren to be a reasonably clear statement of the law in language which, in substance, has received the approval of this court. In such a situation, probably silence, as a general thing, is not inconsistent with a full discharge of judicial duty; though it is thought that individual expression of views on such occasions is often beneficial. With this apology, so to speak,—justification, perhaps, is the better term for the occasion,—I will speak briefly of the omitted matter to which I have referred.

Appellants' counsel complain of this instruction given to the jury:

"If you are satisfied that any witness who testified on either side of this case knowingly and intentionally testified falsely in regard to any fact which is material to the case, then although you are not bound to disbelieve all the testimony given by that witness, you are at liberty to do so, excepting in so far as such testimony is corroborated by other credible evidence or by facts and circumstances in proof."

Since there is a judicially approved way of stating the rule—one that has long been used—it is better to adopt it than to invent new modes of expressing the same. The effort before us is not entirely free from fault. There is an unnecessary use of words, and an arrangement thereof which renders the exact meaning obscure even to those trained to understand such matters. It seems that the ordinary juror might very likely gather an idea therefrom inconsistent with the true rule. Probably the learned trial judge had the correct idea in mind, and aimed to state it so that the jury might understand it. It is not improbable that he really intended to greatly improve upon the language usually employed. However, "in testing the accuracy of an instruction, it cannot be approved because in the sense intended it was free from error, if it was liable to be and may probably have been understood in a different sense which was harmful." *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69. There is room in the court's language for the idea that if a witness wilfully testifies falsely in regard to a material matter in a case where he gives evidence, the jury may reject all of his testimony not corroborated by credible evidence produced or by some fact or circumstance in proof, but not when so corroborated. The correct idea, in the circumstances suggested, is that the evidence can be rejected notwithstanding the corroboration, if overcome by other evidence so as to disprove it in the judgment of the jury, but cannot be rejected on the sole ground that it is wilfully false. Further, as claimed by counsel for appellants, one might gather from the language used the idea that corroborating facts and circumstances are sufficient to prevent the rejection of evidence of a witness on the ground of his having testified wilfully false as to some material matter, if merely testified to or evidenced in some way, though not in a credible way. If this simple method of stating the rule, which, in substance, has been approved by this court from time to time for over forty years, were used

in instructing a jury in regard to the rule of evidence under discussion, any one of them of ordinary understanding would easily grasp the correct idea: 'If you believe that any witness has testified wilfully false as to any material matter in the case, you may properly, but are not bound to, on that ground alone, reject all of his evidence not corroborated by some other credible evidence.' *Mercer v. Wright,* 3 Wis. 645; *Morely v. Dunbar,* 24 Wis. 183; *Bratt v. Swift,* 99 Wis. 579, 75 N. W. 411; *Miller v. State,* 106 Wis. 156, 81 N. W. 1020. This very brief, clear way of stating the rule received approval in *Allen v. Murray,* 87 Wis. 41, 46, 57 N. W. 979, 981. 'If you believe a witness has testified on this trial wilfully false in regard to any matter material to the case, you have a right, if you see fit, to reject all his evidence not corroborated by some credible evidence produced.'

THE STATE EX REL. VITS, Respondent, vs. MANITOWOC WATERWORKS COMPANY, Appellant.

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61 LRA 112n

April 25—May 13, 1902.

Municipal ordinances: Construction: Waterworks: Minimum rates.

1. A municipal ordinance granting a franchise to a waterworks company is not, in case of ambiguity, to be construed most strongly against the company, but by the same rules that govern in the construction and interpretation of statutes.
2. Such an ordinance fixed maximum rates which might be charged to private consumers for certain purposes, and continued: "For other domestic purposes, proportionate to the above, but the lowest annual rate in any case shall be five dollars. Manufacturing and special uses, rates to be based on quantity of water used. All parties have the privilege of furnishing water meter and paying only for water actually used at rates varying from 20 cents to 30 cents per 1,000 gallons, viz: Consumption less than 1,000 gallons per day, 30 cents," etc. When the ordinance was enacted, meters for domestic consumers were

comparatively unknown. *Held*, that the provision relating to meters applied only to takers of water for manufacturing and special uses, and that the minimum rate for domestic purposes was five dollars.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Mandamus to compel the defendant to turn on water on premises owned by the relator. The petition alleges the defendant is a corporation, and the assignee of a franchise granted for the purpose of securing a water supply for public and private purposes in the city of Manitowoc. One of the conditions of the ordinance granting the franchise was that all persons had the privilege of furnishing water meters and paying for the water used at rates not exceeding thirty cents per 1,000 gallons. Relator put in a meter, and for the year ending September 30, 1899, used 3,787 gallons, which, at the maximum rate, would entitle defendant to $1.14. This sum was tendered to defendant, and refused. On November 1, 1899, the defendant cut off relator's water supply, and has refused to turn on water when demanded. An alternative writ of *mandamus* was issued, to which the defendant made due return, claiming that a proper construction of the ordinance in question fixed the minimum rate for a supply of water for domestic uses at $5 per year, which sum the relator refused to pay, and that defendant turned off the water because of such refusal, believing it had a right so to do. So much of the ordinance as is material to this litigation is as follows:

"SEC. 17. Said grantees shall furnish abundant supply of water for any and all inhabitants of Manitowoc, upon said pipe system, for any and all reasonable purposes, under such conditions and regulations as said grantees may impose, and may enforce such regulations by cutting off the water supply from such consumers or in any other manner. And said grantees may charge and collect, as their annual rates to such private consumers, prices equal to but not to exceed the following."

Here follows a table fixing maximum rates for domestic and other uses. The section continues thus:

"For other domestic purposes, proportionate to the above, but the lowest annual rate in any case shall be five dollars. Manufacturing and special uses, rates to be based on quantity of water used. All parties have the privilege of furnishing water meter and paying only for water actually used at rates varying from 20 cents to 30 cents per 1,000 gallons, viz.: Consumption less than 1,000 gallons per day, 30 cents; 1,000 to 2,000 gallons, 25 cents; 2,000 to 4,000 gallons, 20 cents; 4,000 gallons or over, 15 cents per 1,000 gallons. And 13, 12 and 10 cents where much greater quantity is desired. And the water rents charged by said grantees to consumers for domestic and manufacturing purposes shall not exceed the average rates charged at other cities in Wisconsin similarly situated, being supplied by a like system."

On the trial the defendant produced evidence showing that when the ordinance was passed, in 1887, the use of meters in private residences in cities of the size of Manitowoc was unknown; that the cost of delivering metered water was $2.50 per year for each customer; that $5 per year was a reasonable minimum value for metered water, and smaller than the average minimum rates charged in other cities in Wisconsin; and that a water company could not safely do business if it were compelled to allow all customers taking water for domestic purposes to pay according to the amount used, without reference to the fixed minimum rate.

The trial court made findings in favor of the relator to the effect that the cutting off of the water from his premises was wrongful and unjustified. Judgment for six cents damages and for a peremptory writ of *mandamus* was entered, from which defendant takes this appeal.

For the appellant there was a brief by *Nash & Nash*, and oral argument by *L. J. Nash*. They argued, among other things, that ordinances, by-laws, rules, and regulations concerning the price a water company may charge private consumers must be reasonable and without discrimination. This

makes it impossible to apply the rule of interpretation governing public grants. The rule of reasonableness under all the attendant circumstances must be sought for, rather than a rule favorable to the public. The public, the city, is not a party to, and is not interested in, this controversy. *Shepard v. Milwaukee G. L. Co.* 6 Wis. 539; *Spring Valley W. Works v. San Francisco* (Cal.) 6 L. R. A. 756; *Rushville v. Rushville N. G. Co.* (Ind.) 15 L. R. A. 321; *Louisville, E. & St. L. C. R. Co. v. Wilson* (Ind.) 18 L. R. A. 105; *Cowden v. Pacific Coast S. S. Co.* (Cal.) 18 L. R. A. 221; *Lough v. Outerbridge,* 25 L. R. A. 674; *American W. W. Co. v. Nebraska* (Neb.) 30 L. R. A. 447; *Griffin v. Goldsboro W. Co.* (N. C.) 41 L. R. A. 240; *Brymer v. Butler W. Co.* (Pa. St.) 36 L. R. A. 260; *San Diego W. Co. v. San Diego* (Cal.) 38 L. R. A. 460.

For the respondent there was a brief by *Schmitz & Burke,* and oral argument by *R. W. Burke.* To the point that the ordinance ought to be construed strictly in favor of the public and against the water company, they cited Sutherland, Stat. Const. 485–487; *Bartram v. Central T. Co.* 25 Cal. 283; *Hartford B. Co. v. Union F. Co.* 29 Conn. 210; *Shorter v. Smith,* 9 Ga. 517; *McLeod v. Burroughs,* 9 Ga. 213.

BARDEEN, J. In his written opinion the trial court held that if there was any ambiguity in the ordinance, or the meaning of the words used was doubtful, they were to be taken most strongly against the defendant. He admitted that an ambiguity arose in the ordinance from the two conflicting provisions, one fixing "the lowest annual rate in any case" at five dollars, and the other giving all persons the privilege to use meters and to pay only for water actually used at a specified rate per gallon. In that view he permitted testimony to be introduced of the surrounding circumstances, of the rates fixed in other cities, and of the actual cost of delivering metered water, but all this evidence was brushed aside in

obedience to the rule of construction he believed ought to prevail. We agree with him in the conclusion that the true intention of the parties is not perfectly clear. We think, however, the ordinance must be construed by the same rules that govern in the construction and interpretation of statutes. *Ashland W. Co. v. Ashland Co.* 87 Wis. 209, 58 N. W. 235. One of those rules is that the whole statute must be considered, and each clause construed by the light thrown upon it by every other. The ruling intention gathered from all the language used is to be sought for and, when discovered, given effect. This rule is elementary, and needs no citation of authorities for its support. Another rule is that the construction must be such as will produce reasonable results, if the language used will permit it. If one construction would be oppressive and burdensome to one of the parties, and another, equally permissible, will avoid the hardship, the latter should be adopted in preference to the former.

In the light of these rules, let us examine the ordinance in question. The company was bound to furnish an abundant supply of water for any and all inhabitants of the city for all reasonable purposes. Certain of these purposes were expressly mentioned, and the company was entitled to collect an annual rate not to exceed the one specified. Then it says: "For other domestic purposes, proportionate to the above, but the lowest annual rate in any case shall be five dollars." The intent seems clear to establish a maximum and a minimum rate for every kind of domestic use. It then takes up a new subject, "manufacturing and special uses," to be paid for on the basis of water actually used. Then follows the clause which has given all the trouble: "All parties have the privilege of furnishing water meter and paying only for water actually used at rates varying from 20 cents to 30 cents per 1,000 gallons." This the court construed to cover all persons and all uses, whether domestic, manufacturing, or special, on the ground that it must be construed most strongly against the

defendant. Standing alone, and divorced from its surroundings, it might bear that construction; but, when read in connection with all that precedes and that which follows, we do not think this construction permissible. The fact proven, that meters for domestic consumers were comparatively unknown at that time, is a circumstance tending to show that such consumers were not in mind when this language was used. The fact that, in the language immediately following, rates for "consumption less than 1,000 gallons per day" were fixed, indicates with reasonable certainty that meter rates were being fixed for "manufacturing or special uses,"—for users who used such large quantities as to require a record of daily use to be kept. The provision following fixing rates where still greater quantities were used indicates that the subject in mind still had reference to the "manufacturing or special uses" referred to. Reading the whole section, and giving all its parts a reasonable construction, in the light of the situation of the parties, we think it quite evident that when the ordinance speaks of "all parties," etc., it has reference to all parties taking water for "manufacturing or special uses," and was not intended to cover users for domestic purposes, which had already been provided for. If parts of the ordinance are to be singled out and construed as though standing alone, then there would be as good reason for saying that the clause, "but the lowest annual rate in any case shall be five dollars," applies to all consumers, as to say that the portion referring to "all parties," etc., does not refer to its immediate context, but does refer to every person taking water, regardless of its use. If these two provisions are in seeming conflict, then such construction should be given, if possible and reasonable, as to harmonize and remove such conflict. This can be done in the manner suggested. We arrive at this conclusion the more readily because it harmonizes the ordinance, acquits the parties of any intention to discriminate against domestic users at the faucet rate, in-

sures the company a reasonable return above the cost of furnishing water, and seems more nearly in accordance with the intention of the parties as gathered from the surrounding circumstances.

By the Court.—The judgment is reversed, and the cause is remanded with directions to enter judgment denying the writ.

NIX, Respondent, vs. C. REISS COAL COMPANY, Appellant.

April 25—May 13, 1902.

Master and servant: Injury from falling timber: Unsafe place: Notice of defect: Proximate cause: Instructions to jury: Special verdict: Evidence: Appeal and error.

1. A fire in defendant's coal yard had damaged a structure of timbers, about twenty feet high, supporting tramways for the distribution of coal, and plaintiff, with others, was engaged in removing the soft coal, shoveling it into barrows and wheeling it to railroad cars. Much of the structure had been pulled down, plaintiff assisting, but a portion of it remained where they were at work. The top of the coal pile, which was about eighteen feet high, was covered with a thick icy crust, and it was necessary to break this up with picks. A co-employee so engaged loosened a mass weighing sixty or seventy pounds, which rolled down the face of the pile and struck an upright post or timber, from about which the coal had been removed so that only three or four feet of it remained covered. A horizontal timber resting on the top of the post immediately fell and injured the plaintiff. These facts, together with evidence tending to show, among other things, that the top of the post and the cap by which the horizontal timber was secured had been partially burned away; that the damage was greater on the westerly side and was not easily discoverable from the ground to the eastward, from which direction the men removing the coal had advanced; that plaintiff's duties had not taken him west of the post; and that defendant's foreman had inspected the structure and this particular post only a day or two before the accident,—are *held* sufficient to sustain findings of a special verdict to the effect that the support or fastenings

of the beam which fell had been so far destroyed by the fire as to render the place where plaintiff was working unsafe and dangerous; that defendant was chargeable with knowledge of that fact; that the plaintiff was not chargeable with such knowledge; and that defendant should reasonably have foreseen that such an accident was likely to result from the defect.

2. It appearing that the post in question was so braced that its top leaned toward the east, the fact that, although the mass of coal struck the post on its westerly side, the horizontal beam which had been resting on the partially burned-away top fell to the eastward, and the post was afterwards found leaning slightly to the west, does not render unreasonable or purely conjectural the conclusion that the defective condition at the top of the post was the proximate cause of plaintiff's injury by the falling timber.
3. An instruction that, in order to find proximate causation, the jury must be satisfied that the injury was the natural and probable consequence of the defect, and foreseeable by the exercise of ordinary care, was correct, and, while some of the terms used might properly have been amplified, the omission of such amplification was not error, in the absence of a formal request therefor.
4. A refusal to submit for special verdict the question whether the risks and dangers of plaintiff's work were open and obvious to a person of ordinary intelligence, is *held* not to have been error, where the jury were required to find whether or not the plaintiff knew of the unsafe and dangerous condition or by the exercise of ordinary care should have known of it.
5. The fact that plaintiff and his fellow laborers, as they carried off the coal, progressed from one end of the shed towards the other did not constitute such a change in, or creation of, the conditions of the place to work, as to relieve the defendant from liability for damages caused by the dangerous condition of the post at the point where it supported the timber.
6. The admission of evidence of the taking down of a portion of the superstructure lying in the direction from which the removal of the coal had progressed is *held* not to have been prejudicial to defendant, where the court excluded, because not pleaded, any liability of the defendant for any weakening of the remainder of the structure arising from such removal.
7. Assignments of error not argued by appellant will not ordinarily be considered.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for personal injuries suffered by the plaintiff as an employee in defendant's coal yard at Sheboygan. That coal yard extended two or three hundred feet north and south along the water's edge, which was on its west. The westerly part of it consisted of a shed under which the hard coal was kept, and the easterly part was open dumping ground for soft coal, and bounded easterly by railroad tracks. The portions devoted to the two different kinds of coal were separated by a fence a short distance east of the eaves of the coal shed. The yard was completely traversed by a superstructure of tracks for the distribution of coal in small cars. This structure consisted of upright 10x10 posts, approximately twenty feet high, and twenty feet apart in each direction. These posts were surmounted by 8x8 or 8x10 timbers, running over their tops from north to south, secured from slipping off by the spiking of two-inch plank onto the upright posts and onto the surmounting timbers, forming caps, so called. On top of, and at right angles to, these north and south timbers, and along each line of posts running east and west, were the tracks, which were supported by two planks, 3x10, set edgewise. The upright posts were braced to each other and to the ground.

On December 31, 1900, the yard was mainly filled with coal extending to a height of some eighteen feet, or nearly up to the timbers on top of these posts. On that day a fire broke out which destroyed the coal sheds and burned down some of the superstructure of tracks, reaching in this respect about to the fence dividing the hard and soft coal, but leaving the track structure undestroyed from thence eastward to the railroad tracks, although fire had run over it to some extent further eastward, charring and blackening it. The fire also communicated itself to the piles of coal, and apparently for some days afterward the fire department poured water copiously onto the coal, which in many places formed a thick

coating or crust of ice, mingled, of course, with the upper portions of the coal.

Commencing on the 1st of January, the defendant set to work a gang of men, who commenced on the east side of the yard, and proceeded to move the soft coal piled therein into cars on the railroad track above mentioned, working their way gradually westward. The plaintiff was amongst those employed; his business, like that of others, being to shovel the coal from the pile into a wheelbarrow, and wheel it to the railroad cars. In doing this it was continually necessary for some of the men to climb on top of the pile with picks and break down the icy crust, and the peril from such falling lumps or chunks was of frequent occurrence, and was obvious to all of the workmen. On the 19th of January the work had progressed so that the plaintiff and those immediately with him were working under the last section of the tram track structure which remained undestroyed by fire, and were within about twenty feet of the fence dividing the hard and soft coal. A few days before, the tram track structure immediately south of where they were at work had been pulled down by cutting off the upright posts, and by sawing off the north and south timbers on a line about six feet south of the uprights which were left standing. Plaintiff, together with other workmen, had participated in the taking down of such structure by pulling on ropes after the cutting away had been done. On the day in question, one of the crew with whom the plaintiff was at work went up on top of the pile to break down the icy crust, and succeeded in breaking off a mass of some sixty or seventy pounds' weight, which rolled down the inclined face of the coal pile, and struck the southwesternmost upright there standing, from about which the coal had been removed so that only about three or four feet of it was still covered. The collision was followed immediately by the fall of the north and south horizontal timber resting on top of that upright, together with some of the superstructure

above, whereby plaintiff was severely injured. The upright did not fall, but after the fall of the superstructure was found still standing, but the top leaning slightly westward; the timber having fallen on the easterly side of it.

A special verdict of nineteen questions was taken, the material parts of which are to the effect that plaintiff was working at a place directed by one Roth, as foreman; that the support or fastenings of the beam which fell had been so far destroyed by the fire as to render the place where plaintiff was at work when he was injured an unsafe and dangerous place; that the fall of said beam was caused by such destruction of its supports and fastenings; that the defendant, through its proper representative, knew that the place was then unsafe and dangerous, and that by the exercise of ordinary care the defendant should have made the place in question reasonably safe before the time when the plaintiff was injured; that the defendant should "reasonably have foreseen . . . that the natural and probably consequence of permitting the trestlework and the supports or fastenings of said beam or timber to remain in the condition in which they were at and before the time of the injury would be to cause said beam to fall upon and injure some of the coal shovelers;" that the condition of the trestlework and the supports or fastenings of said beam was the proximate cause of plaintiff's injury; that the plaintiff's injury was not the result of accident or misfortune which defendant could not have foreseen and prevented by the exercise of ordinary care; that the plaintiff did not have knowledge of the unsafe and dangerous character of the place, nor by the exercise of ordinary care should he have had such knowledge; and that no want of ordinary care on his part contributed to produce the injury.

Defendant at the close of the evidence moved for the direction of a verdict in its favor, and afterwards moved to reverse the answers to most of the material questions, and also

moved to set aside the verdict and for a new trial, all of which motions were denied, and judgment entered in favor of the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Phillips & Hicks,* and oral argument by *M. C. Phillips.*

For the respondent there was a brief by *C. A. Dean,* attorney, and *Simon Gillen,* of counsel, and oral argument by *Mr. Gillen.*

DODGE, J. 1. The assignments of error to which substantially the whole of appellant's brief and argument is devoted involved the contention that there was no evidence to support the several findings of the jury upon which liability of the defendant is predicated. The rules of law governing such a situation are familiar, and need hardly more than statement. The master owes it to his employee to make the place where the latter is to work reasonably safe, so that injury is not reasonably to be expected by one of ordinary foresight and care. *McMahon v. Ida M. Co.* 95 Wis. 308, 70 N. W. 478; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22. This duty is qualified by the further rule that the master is not to be made liable, although there are defects, and although the place is not safe, if such defects and unsafety either were known to the employee, or were so apparent that they should have been known to him in the exercise of ordinary care and observation consistent with the situation presented. *Larsson v. McClure,* 95 Wis. 533, 70 N. W. 662; *Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878; *Mielke v. C. & N. W. R. Co., supra.* The appellant asserts that there was no evidence upon which the jury could have found that the place was unsafe, or that, if so, the defendant knew it or by reasonable diligence could have known it, or that the plaintiff was ignorant, or could, consistently with reasonable care, have been ignorant, of the true situation; and he further contends that if the place in question were unsafe in the respect found

by the jury, namely, in the burning away of the fastenings which held the horizontal timber in place on top of the vertical post, still there is no evidence that the fall of the timber and the injury to the plaintiff were due to that condition.

We have examined the evidence with great care, and find that it is characterized by some measure of conflict and dispute as to the situation, and also by considerable measure of uncertainty in the application of the statements of witnesses to the situation and the structure under which the plaintiff was working. In the latter respect, of course, we must recognize the superior advantages of both jury and trial judge to understand what the witnesses meant. *Clifford v. M., St. P. & S. S. M. R. Co.* 105 Wis. 618, 81 N. W. 143. There is, however, no doubt that plaintiff was expected to work under this network of timbers and tram tracks, and that any condition thereof which rendered their fall probable in the course of the performance of the service as it had been laid out would justify an expectation of injury to workmen of the class of the plaintiff. It appears that the fire occurring three weeks before had been effective to burn away posts and superstructure for a considerable distance, but had lost that measure of force and destructiveness just short of the post near which plaintiff was injured, which is called in the testimony, and will be spoken of hereafter as, the "southwest post." It also appears that the fire had run to some extent over all the rest of the trestlework, but, generally speaking, not so as to seriously destroy timbers or impair the strength of the structure. There is evidence of two witnesses that as to this southwest post much more destruction had taken place than with reference to the others which were still standing. One witness says that he looked at the post after the timbers fell, and found that the top had been burned off. Another testifies that the cap was already gone, but that the burning was not easily discoverable from the ground to the eastward of this post, both because it was more on the westerly side of the post, and

because the timbers had some coating of ice, obscuring their true condition, but that such ice had been broken away on the westerly side of the post. There is also evidence that the defendant's foreman, generally in charge of the yard, had gone over this structure soon after the fire, and that he had gone onto and inspected the condition of this particular post only a day or two before the catastrophe. He contradicts the testimony as to its condition, but that, of course, could only suffice to make that a jury question.

In this situation, we are unable to say that there is no evidence that the fastenings intended to retain this large timber on top of the upright had not been so destroyed and impaired by fire as to render them inadequate; nor are we able to say, as the counsel for appellant argues, that the defendant and the plaintiff stood upon an equality as to their opportunities for knowledge. Plaintiff had been placed upon the ground, working from the east westward. He had had no duty, nor suggestion of any reason, which should take him to the westward of this alleged defective corner; and, as we have said, there is testimony that its defects were not apparent as he worked toward it on the ground. The shoveling away of coal at the bottom of the pile was the method adopted by the master for doing the work upon which plaintiff was employed. This rendered certain the precipitation of the coal from the top of the pile down the steeply inclined easterly face thereof from time to time, whether by reason of its own weight, or by reason of its being picked away, as was in progress at the time of the injury; and, of course, the contact of such falling lumps with the posts was not only a probability, but practically a certainty. The lump which fell at the time of the injury certainly cannot be said to have been of a size beyond reasonable expectation. It is described as about eighteen inches long by a foot wide and six or eight inches thick, and, while made up of coal fastened together by ice, it was no larger than lumps of soft coal are often found. So that the

peril of contact of such lumps with the standing posts was one of those with reference to which it was the duty of the master to see that the overhead structure was reasonably safe. Hence, upon the four questions as to the existence of a defect creating unsafety, the knowledge or opportunity of knowledge of the master, the ignorance of the plaintiff, consistently with due care, and the reasonableness of expectation that injury might result, we are clear that there was at least some evidence which might, to the minds of reasonable men, lead to the answers given by the jury.

But it is argued that the further question whether such defect was the actual cause of the fall of the timber and the plaintiff's injury is pure conjecture, into which the jury ought not to have been allowed to stray. We cannot think so. It is in evidence that the four upright posts constituting a section were connected by diagonal braces near the top, which drew the tops toward each other, so that the top of the post in question was leaning towards the northeast,—held there by the strain of the transverse braces. It is found by the jury that the caps, which under ordinary circumstances had been relied on to hold the horizontal timber in place and prevent it from slipping off of the top of the post, had been destroyed to such degree as to render the situation unsafe; and there is evidence that the top of the post had been burned off to some extent. Now, if in this situation one of the events likely to occur in the course of the work as the master directed it to be done, namely, the collision of a lump of coal with the post, was likely, in ordinary human experience, to cause this horizontal beam to slip off of the top of the post eastward, how can it be said that the jury, in view of the whole situation, and in the absence of evidence of any other cause, could not have concluded, as reasonable men, that that situation was the cause of the precipitation of the timber? We think they might. The timber could not fall without some cause. One is shown, sufficient within ordinary probabilities. The infer-

ence is reasonable that such one was the cause, in absence of any other reasonable one. It is urged that there is a physical fact inconsistent with such conclusion and which renders it unreasonable and impossible. That fact is that the timber was found on the easterly side of the post, whereas it is claimed that the effect of the collision of the lump of coal would have been to drive the post to the eastward, so that the timber would have fallen on the westerly side of it. We cannot say that this conclusion is unavoidable. If upon an inadequate and partially burned-away end of this post there were insecurely resting a timber, a mere jar might well suffice to set it in motion, in which event its slip would naturally be toward the east, as the top of the post inclined that way. There is no necessary and unavoidable inference that the fall of a sixty-pound lump of coal against a 10x10 timber, with the bottom embedded in three or four feet of coal, would serve to move that timber materially in the direction of the falling lump. We think it at least equally probable that, while the jar would be considerable, the actual movement of the top of the post to the eastward might be almost infinitesimal. Hence we find ourselves unable to declare that the jury could not, as reasonable men, have answered that the defective condition at the top of the post was the proximate cause of plaintiff's injury by the falling timber.

2. Appellant complains of the instruction to the jury defining "proximate cause." That instruction informed the jury that, in order to find proximate causation, they must be satisfied that the injury was the natural and probable consequence of the defect, and foreseeable by exercise of ordinary care. These are the essential elements, and, while more amplification of some of the terms used has been approved in some cases, the omission of such amplification is not error,—certainly when not formally requested. We find no error in the instruction on this subject.

3. Appellant urges a group of assigned errors predicated

upon the refusal of the court to submit, as part of the special verdict, certain other questions. In view of the fact that in a case of this simplicity some nineteen questions were submitted, we should expect to find redundancy rather than deficiency. The first complaint is that the jury were not asked whether the risks and dangers of the work were open and obvious to a person of ordinary intelligence. This fact, if it existed, was an evidentiary one, and was naturally involved in the two questions submitted, namely, whether the plaintiff knew of the unsafe and dangerous condition, or by the exercise of ordinary care should have known. Of course, the latter of these questions must have been answered in the affirmative if that condition was open and obvious, and the court carefully so instructed the jury. In the refusal of this additional question no error was committed.

The appellant also complains that no question was submitted as to whether the conditions and surroundings of the place of plaintiff's work were changing as a result of the work in which he was engaged. The only defect upon which plaintiff was allowed to recover was the condition of the fastenings of timber to the southwest post, resulting from a fire occurring some three weeks before. There was no particle of evidence that that condition was in any respect caused or changed by reason of the work in which the plaintiff and his fellow-servants were engaged. It was a condition existing before their work commenced, and with reference to which their work was done, and obviously was intended to be done by the defendant. The fact that day by day, as they carried off coal, they progressed from under one timber to another, was not in any respect changing or creating the conditions of the place of work in the respect complained of and made the basis of liability. Had the business of this gang of men been the tearing down of a structure such as here described, it might be claimed that weakening of the portions of the structure still standing, resulting from previous work, was a condition which they them-

selves created and changed, and which therefore must be held to be within their knowledge as fully as within that of their employer. It would be as reasonable to contend that a painter progressing upward on a ladder, and injured by reason of a defective rung, changed and therefore created the conditions of his work, because he had gradually progressed upward toward the defect. This principle of the employee's responsibility for the conditions which he and the force with which he works create is fully illustrated in *Larsson v. McClure,* 95 Wis. 539, 70 N. W. 662, and *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22. Those illustrations make obvious its inapplicability to the situation presented in this case,—of an inadequate and perilous overhanging structure, with reference to which the plaintiff performed no duty and had no relation, except to be compelled to work under it.

Complaint is also made of the failure to submit some other alleged issues,—such, for example, as whether the weight of ice broke the structure down, and whether any warning or caution was given to the plaintiff. On neither of these, however, was there any conflict in the evidence to warrant their submission to the jury; and, at best, the facts to be called out by them would have been evidentiary upon certain of the issues which were submitted and passed upon.

4. Exception was taken and error assigned upon the admission of evidence that a couple of sections of trestlework lying to the south of that where plaintiff was injured were taken down some two or three days before the accident occurred. Wherein the admission of such testimony could have been prejudicial to the appellant is not pointed out. The court carefully excluded any liability of the defendant for any weakening of the remaining structure which might have resulted therefrom because not pleaded. The admission of such proof was entirely natural in the description of the situation, which could hardly be made intelligible otherwise; but, in any event, the fact so proved was alleged in the complaint

and not denied by the answer. We can discover no prejudice in the admission of this evidence, even if its admission were considered to be erroneous.

The foregoing are all of the errors argued by appellant, either in his brief or orally, though others are assigned. It cannot be the duty of this court, under such circumstances, to seek out the reasons for the assignment of others, or their applicability to the case. *Butler v. State,* 102 Wis. 364, 78 N. W. 590; *Cornell v. State,* 104 Wis. 527, 535, 80 N. W. 745. Among those which the appellant has deemed worthy of argument we find none which can justify us in reversing the judgment.

By the Court.—Judgment affirmed.

THE STATE EX REL. WISCONSIN TELEPHONE COMPANY, Appellant, vs. CITY OF SHEBOYGAN and others, Respondents.

April 26—May 13, 1902.

Telephone companies: Use of streets: Extensions: Grant of franchise.

A telephone company having a franchise and right, under sec. 1778, Stats. 1898, to construct and maintain its lines upon the streets of a city and to extend such lines from time to time, submitted for approval its plans for an extension, pursuant to a city ordinance requiring such plans to be approved by the council. *Held,* that it thereupon became the duty of the council to take affirmative action recognizing the company's right, and that such duty was not affected by the subsequent adoption by the city of secs. 940c–940t, Stats. 1898, regulating the selling of franchises.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. P. Miller.*

T. M. Bowler, for the respondents.

CASSODAY, C. J. It appears from the record that February 17, 1900, the relator filed in the trial court its petition for an alternative writ of *mandamus* to compel the city and its common council and officers to grant the petition of the relator, dated August 31, 1899, and submitted to the common council September 11, 1899, with the plan made by the relator,—copies of both of which were thereunto attached,—and to approve of such plan, and for such other, further, and different relief as may be just and equitable. To such petition the defendants made return March 26, 1900. To such return the relator demurred for insufficiency April 12, 1900. From an order overruling such demurrer the relator appealed to this court. On June 20, 1901, that order was reversed by this court, and the cause was remanded with directions to sustain the demurrer to the return, and for further proceedings according to law. 111 Wis. 23, 41, 86 N. W. 657. The substance of such petition and return are stated in the report of the case, and no repetition here is necessary.

Upon the *remittitur* being filed, the defendants, with leave of the trial court, filed an amended return August 20, 1901, containing the substance of what was contained in the original return, and in addition also alleging, in effect, that upon a petition signed by ten per centum of the qualified electors of the city, and filed with the city clerk twenty days prior to the general election held November 6, 1900, the question of granting franchises by the common council as prescribed by sec. 940*j*, Stats. 1898, was submitted to a vote of such electors, and 1,494 of such electors voted in the affirmative, and 301 in the negative, and that thereupon secs. 940*c* to 940*i* of the Statutes of 1898 became and continued to be in force, and applied to the city of Sheboygan, and that the defendants had "no power or authority to act contrary to such sections"; that August 15, 1901, preambles and a resolution were adopted by the common council, reciting the petition of the relator, dated August 31, 1899, and so submitted September 11, 1899,

and also the adoption by the qualified electors of the city of the right to grant franchises as prescribed by secs. 940*c* to 940*i*, Stats. 1898, and that rules and regulations for the maintenance and operation of the extension of the relator's telephone plant, and the conduct of its business, be, and the same were thereby, established, to the effect that poles might be set and wires run upon the streets as therein prescribed; the manner of conducting its central exchange, and its attendants; the quality and condition of the wires; the maximum rate of charges to persons or customers; the manner of erecting and placing all poles, wires, and appurtenances; and that bids for such franchise should be advertised as therein prescribed, and that, in case the relator should make the highest bid, such franchise should be granted to it upon making the requisite deposit and giving the requisite bond; that after the passage of such resolution, August 15, 1901, the common council did so advertise for bids for such franchise up to and including October 1, 1901; that the relator had not submitted any bid pursuant to such advertisement; that by such resolution the defendants had complied with the law with reference to such petition; and that in and by such resolution the defendants had exercised their discretion and judgment in the premises. The relator demurred to such amended return on the ground that it does not state facts sufficient to constitute a defense, or any reason why the peremptory writ of *mandamus* should not issue. From the order overruling such demurrer the relator brings this appeal.

It is conceded in the amended return, as it was in the original return, that the relator was in 1882 duly incorporated and organized for the purpose of conducting a telephone business under ch. 86 of the Statutes of this state. See secs. 1771, 1775, 1778, Stats. 1898; *Wis. Tel. Co. v. Oshkosh,* 62 Wis. 32, 21 N. W. 828; *Roberts v. Wis. Tel. Co.* 77 Wis. 589, 46 N. W. 800; *Marshfield v. Wis. Tel. Co.* 102 Wis. 604, 78 N. W. 735; *Krueger v. Wis. Tel. Co.* 106 Wis. 96, 81 N. W.

1041. Under such statutes, as construed by the cases cited, it was held by this court on the former appeal, in effect, that the relator had, as against the public, authority to occupy the streets of the defendant city, and to build and operate telephone lines therein, and to conduct the business of telephoning therein, and might construct and maintain any such lines, with all necessary appurtenances, from point to point upon or along or across any of such streets, "or upon the land of any owner consenting thereto, and from time to time extend the same at pleasure," subject, however, to such conditions, restrictions, and regulations as are or may be prescribed by law. In the opinion of this court on that appeal, Mr. Justice BARDEEN, among other things, said:

"The right to construct and maintain poles in city streets is as ample and positive as to build in the country highways, except that it may be subject to stricter police regulations, as will be more fully discussed in a subsequent portion of this opinion." 111 Wis. 33, 86 N. W. 657.

And then, after discussing such police powers at some length, he further said:

"Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger, and to determine in what manner the relator may erect its poles so as to accomplish this result. . . . It has no authority to impose other conditions. That power rests in the legislature. The power to regulate charges was not included in, or incidental to, the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail."

And in conclusion it is said that the relator

"presented its petition, with a plan of its proposed improvements and extensions. It signified its willingness to submit to such changes as were deemed for the best interest of the city. It then became the duty of the city to take affirmative action. What that action should be, the court has no power

to declare. It can only say 'act, and let such action be in harmony with the powers granted in the charter, as herein construed.' "

Instead of so acting, the defendants, by the amended return, declare that they "have no power or authority to act contrary to secs. 940*c* to 940*i*, so adopted by the qualified electors of the city November 6, 1900," as mentioned in the statement of facts. The defendants further excuse their nonaction by reason of the failure of the relator to bid for the franchises which the city was authorized to grant by virtue of such sections and the resolution adopted by the common council August 15, 1901, as mentioned in the foregoing statement. But the relator has not obtained, nor sought to obtain, any franchise from the common council. As indicated, long prior to such action on the part of the city the relator had obtained such franchises and authority directly from the state, under the general statutes cited. Such statutes were not repealed, amended, or suspended by such action on the part of the city November 6, 1900, and August 15, 1901. Nor were such franchises and authority of the relator in any way destroyed or impaired by such action on the part of the city. It follows that such amended return does not state facts sufficient to constitute a defense, or any legal justification for disobeying the command of the alternative writ of *mandamus*.

By the Court.—The order of the circuit court appealed from is reversed, and the cause is remanded with directions to sustain the demurrer to the amended return, and for further proceedings according to law.

FRASER, Executor, Respondent, vs. THE ÆTNA LIFE INSURANCE COMPANY, Appellant.

April 26—May 13, 1902.

Life insurance: Forfeiture: Conditional revival of policy: False certificate of good health: Agency: Ratification: Good faith: Receipts for overdue premium: Admission of conditional liability: Waiver of forfeiture: Estoppel: Verdict by consent: Rescission: Retention of premium: Offer to return: Judgment.

1. After a life insurance policy had lapsed for nonpayment of premium, proof of good health was demanded as a condition precedent to reviving it. The insured being absent from home, another person applied on his behalf for a revival of the policy, certifying in his name, as his agent, that he was in good health, and forwarded the premium. The application expressly stated that if the representation as to good health should prove untrue the policy should cease and be treated as if it had not been revived. In fact the insured was then at the point of death, and died two days later. The company, not knowing of the condition of the insured, gave its renewal receipt for the premium. *Held*, that the policy had been only conditionally revived, and that the company was not liable thereon.
2. It is immaterial, in such case, whether or not the person applying for the revival had authority to make the representation as to the health of the insured. The application and representation were parts of a single transaction, and ratification of one would be a ratification of the other.
3. It is immaterial, also, whether the representation was made in good faith or otherwise. The revival was conditioned upon its truth, not upon its good faith.
4. Although the company was informed, when the application for revival was made, that the insured had been absent from home for several months, that fact does not indicate that the company did not, in issuing the renewal receipt, rely upon the representation as to his good health.
5. The overdue premium was paid by a corporation of which the insured was president, and by request the insurance company, in addition to its renewal receipt, gave the corporation a receipted bill showing payment by it of the premium in full. *Held*, that this did not displace the express condition upon which the money was paid and accepted.

6. Upon receiving proofs of death, showing the falsity of the representation as to the health of the insured, the company wrote to his executor stating that because of such falsity the policy could not be recognized as valid for the full amount, but that upon proper claim being made the company would pay a smaller sum, due thereon, by its terms, as a lapsed policy. The company also called attention to the fact that the assignment by the beneficiary to the executor was not properly stamped, and asked for certified copies of the will of the insured, etc. The executor thereupon affixed additional stamps to render the assignment valid, and sent the papers asked for. *Held*, that the company had not misled the executor into incurring expense or doing or omitting to do anything in the belief that the policy would be recognized as other than a lapsed policy, and that there was therefore no waiver of the forfeiture or estoppel to rely thereon as a defense.
7. A verdict directed for plaintiff by consent of both parties, subject to decision of the court on all issues of law and of fact after argument to be had, leaves the case to be determined on its merits unaffected by the verdict.
8. The policy having been revived conditionally only, failure of the condition *ipso facto* restored the former situation without any act of the company in the way of rescission or return of the premium.
9. Mere retention of the premium, after obtaining knowledge of the facts, down to a time subsequent to the commencement of an action on the policy, did not indicate an intention to waive the forfeiture, there being a manifest purpose on the part of the company to account for the money to the owner of the policy whenever he would receive it, and the attitude of the latter being such as to indicate that a tender would be useless.
10. In an action on the policy, an offer in the answer to return the premium is an admission of liability to that amount, and, there being no offer of judgment or payment of the money into court, plaintiff should have judgment for said amount with costs.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action on a $5,000 insurance policy issued to Albert Landreth April 10, 1889, on a plan requiring a readjustment every ten years of the amount of premium to be paid yearly. The premium was fixed at $39.35 each six months for the

first period. At the end thereof the policy was renewed on the same terms and conditions as before. The assured assigned the policy to his wife. He died April 15, 1899. Formal proofs of the maturity of the policy were duly made. The widow assigned the policy claim to the executor of her husband's will. All matters requisite to a cause of action on the policy in favor of such executor were set forth in due form in the complaint. The defendant resisted payment, claiming that the policy was forfeited for nonpayment of the premium due April 10, 1899; that the default left no claim on the defendant except for two thirds of the reserve and surplus credited to the policy, amounting to $189 at the date of the default, on condition of its being surrendered within one year after such default and a claim being made therefor.

The following facts were established by the evidence. The policy provided, in effect, as follows: Failure to pay any instalment of premium at the time stipulated in the policy shall terminate the insurance contract, subject to an option on the part of the assured, if all premiums upon the policy shall have been paid for the full period of three years, to receive two thirds of the reserve and surplus credited to the policy at the time of the default, or a mere paid-up life policy for such sum as the whole of such accumulations, applied in the manner specified, will buy, in case the assured shall make his choice between the alternatives and make application to the company accordingly, at the same time surrendering the policy, within one year after the default. The assured failed to pay the premium due April 10, 1899. He had then been absent from home about four months. His home and place of business were at Manitowoc, Wisconsin. His business was largely conducted in the corporate name of The Albert Landreth Company, of which he was president. During his absence his mail came to the company as a rule, and was handled by J. L. Brooks, the secretary of the corporation. About April 13, 1899, a letter was so received from defendant, dated

April 12, 1899, and read by Brooks. It was to the effect that the policy had lapsed for nonpayment of the premium of $39.35 due April 10, 1899, and that upon receipt of such amount, together with satisfactory proof that the assured was in good health, as per a form inclosed, the policy would be revived. Thereupon Brooks, in the name of his corporation, sent such amount to defendant, accompanying the same with such form, made out and signed by himself in the name of the assured, and with a letter acknowledging the receipt of a letter from the defendant dated April 12, 1899, stating that a previous letter from the company, relating to the policy, had been forwarded to Mr. Landreth, who had been away from home for four months, and suggesting the possibility of his not having received it, and saying: "We take the liberty to forward to you premium, $39.35, draft for which you will find inclosed. The same we trust will be satisfactory. Please acknowledge receipt and greatly oblige." The following is the form referred to, filled out and signed as it was returned to the company:

"Manitowoc, Wis., Apr. 13, 1899.

"For the purpose of obtaining the revival of policy No. 173,800 issued by the *Ætna Life Insurance Co.*, on the life of A. Landreth, which policy lapsed because of the nonpayment of premium due on the 10th day of April, 1899, I hereby certify that the said myself is now in good health, and there is nothing in my habits or condition which is likely to impair my health or shorten my life. And if this representation shall prove in any respect untrue, said policy shall cease and be treated in the same manner as if it had not been revived. I also agree that by accepting this premium now, the said company incurs no obligation to accept any future premium after it becomes due.

"Witness, ALBERT LANDRETH,
"M. Edwin Roberts. Per J. L. Brooks."

On the margin were written these words: "This certificate should be signed by the beneficiaries under the policy, or by the person who pays the premium, as their agent." A form

was inclosed for defendant to use in acknowledging receipt of the money. A renewal receipt was sent to Brooks April 15, 1899, accompanied by a letter as follows: "I have your letter of the 13th, with health certificate and remittance of premium of A. Landreth, and inclose his renewal, also the receipt on your form." The form was one customarily used by the Albert Landreth Company in its business transactions. As filled out it was a bill against the Albert Landreth Company for $39.35 for life insurance premium, receipted as paid in full.

The statement in the health certificate as to Landreth being in good health was false. He was, when certified to be in good health, at the point of death. He had then been under the physician's care for thirteen days. He died two days thereafter. Defendant was notified thereof as early as April 24, 1899. Brooks did not know of Landreth's condition when he forwarded the certificate of health. The Albert Landreth Company had authority to pay claims against Landreth, particularly for his life insurance, and Brooks had authority to act for the corporation, but neither the corporation nor Brooks had authority to make representations as to the assured's health in connection with the payment of premiums upon his policy, other than that inferable from the authority to pay premiums. When defendant sent the renewal receipt it had no information as to Landreth's health except what was contained in the health certificate.

Proofs of the maturity of the policy were received about June 30, 1899. Such proofs disclosed that Landreth, at the date of the health certificate, was under treatment for the disease of which he died. July 31, 1899, defendant wrote to the executor advising him that the duplicate assignment by Mrs. Landreth to him was defective in that it did not bear the proper amount of revenue stamps, asking him for information as to whether the assignment in his possession was in the same condition, and to forward to it a certified copy

of Landreth's will and the appointment of the executor, and notifying him that the policy could not be recognized as valid for the full amount of $5,000 because the representations as to the health of the assured, upon the faith of which it was revived, were false; but that the company would pay on the policy the amount the assured was privileged to claim thereon after forfeiture, $729, conditioned upon a claim being made therefor within one year after the lapse, accompanied by a surrender of the policy, and would also return the $39.35 sent to it by Brooks with the false health certificate, the offer being made without prejudice to the rights of defendant in case it was not accepted. In response thereto the executor wrote to defendant, inclosing the papers asked for and stating that the original assignment of the policy to him contained, in the first instance, but a ten-cent revenue stamp, but in accordance with the demand of defendant $4 in stamps in addition had been placed thereon, and that the executor deemed the policy valid for the full amount indicated upon its face. August 4, 1899, at the office of the Albert Landreth Company, defendant tendered to Brooks the amount sent with the false health certificate. He refused to receive the same, referring the person making the tender to the executor.

The action was commenced November 25, 1899. Defendant seasonably answered alleging, among other things, an offer to pay back the $39.35 to Brooks, and that the same having been refused the money had been deposited with the clerk of the circuit court subject to the order of the court. The money was not in fact paid into court. At the close of the evidence the attorneys for the parties agreed that the court might direct a verdict in favor of plaintiff for $5,212.58, subject to the decision of the court upon all the issues in the case. Thereafter the court decided that the policy was revived by the payment of the $39.35 notwithstanding the health certificate was false, because, first, the representations made by Brooks therein were not fraudulently made; second,

because he had no authority to make the representations; third, because the defendant did not rely on the health certificate. Judgment was accordingly rendered for plaintiff for the amount of the verdict. The questions discussed in the opinion were saved for the purposes of an appeal by proper exceptions.

For the appellant there were briefs by *Bird, Rogers & Elver,* and oral argument by *George W. Bird.*

For the respondent there was a brief by *Nash & Nash,* and oral argument by *L. J. Nash.*

MARSHALL, J. We are unable to see any merit in the grounds upon which the trial court ordered judgment for plaintiff. It is conceded that the policy was forfeited for nonpayment of the premium due April 10, 1899; that satisfactory proof of good health of the assured was demanded as a condition precedent to reviving it; that proof in that regard was submitted by the person who assumed to have authority to and did send the money to pay the premium; that the application for the renewal of the policy stipulated that favorable action thereon should not be effective if the representations as to the assured being in good health should prove untrue; that the company forwarded the renewal receipt in response to that application; and that such representations were false. Whether Brooks had authority in fact, express or implied, to make the representations, is not material. He made them, and the application for a revival of the policy, assuming to act for the assured, and the company granted the application conditioned upon such representations being true. His acts in sending the application and the money to pay the premium, and in making the representations contained in the health certificate, are inseparable. They constitute together a single transaction which cannot be deemed ratified in part and repudiated in part. No principle of law is better understood than that ratification of a part of an unauthorized trans-

action confirms the whole. *Fargo v. Ladd,* 6 Wis. 106; *Lachner v. Salomon,* 9 Wis. 129; *Paine v. Wilcox,* 16 Wis. 202. Obviously, if Brooks had authority to apply for a reinstatement of the policy, he had authority to make the necessary representations to secure such reinstatement if the facts would warrant it; and if he had no authority to make such representations, he had no authority to make the application. Ratification of his authority as to one thing ratified his authority as to the other. It is too elementary to justify us in discussing the matter, that a person cannot have the benefit of a transaction and repudiate the responsibilities thereof. If he insists upon the one, he subjects himself to the other as regards civil remedies. *Morse v. Ryan,* 26 Wis. 356; *Kickland v. Menasha W. W. Co.* 68 Wis. 34, 31 N. W. 471; *Carpenter v. Momsen,* 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692; *McDermott v. Jackson,* 97 Wis. 64, 72 N. W. 375. The principle under discussion is stated by standard text writers thus:

'The principal cannot avail himself of the benefits of the act of a person assuming to represent him in a transaction and repudiate its obligations. Having, with full knowledge of all the material facts, ratified, either expressly or impliedly, the act assumed to be done in his behalf, he thenceforward stands responsible for the whole of it to the full extent to which the agent assumed to act, and he must abide by it whether the act be a contract or a tort and whether it results to his advantage or detriment.' Mechem, Agency, § 167.

It follows that the claim, as regards the means by which the conditional revival of the policy was secured, stands precisely the same as if used by Landreth himself.

It necessarily follows from what has been said that whether Brooks fraudulently misrepresented the condition of Landreth in applying for a renewal of the policy, is entirely immaterial. It was revived conditionally. The condition was that the representations as to the assured's health were true. The court had no right to change that to a mere condition as

to the good faith of the representations. Appellant had a right to allow a revival of the policy upon any terms it saw fit to impose. The condition that the assured, at the date of the application for the revival, was in good health, was imposed. That was agreed upon between the company on the one side and the assured, acting by Brooks, on the other. We say "acting by Brooks, on the other," because the claim made upon the policy gives original validity to the assumption of authority by Brooks. It is no part of the proper business of a court to change that agreement so as to give the company the benefit only of a good-faith representation of the existence of a fact in place of a guaranty of its existence. If courts possessed any such function as that, the right of persons to freely contract with each other would always be subject to judicial scrutiny, and their contracts changed to suit judicial notions of fairness.

The learned trial court concluded that appellant did not rely on the representations contained in the health certificate, from the fact that it was informed by Brooks' letter, accompanying the representations, that Landreth had been away from home for several months. We are unable to see how such circumstance can reasonably be said to indicate that appellant did not, when the renewal receipt was issued, suppose that Brooks acted upon satisfactory evidence to him of the truth of his statements. However, by the terms of the renewal, knowledge on the part of the person making the representations was not the thing of controlling significance. Whether he possessed such knowledge or not was rendered of little significance, since it was stipulated that if Landreth was not in fact in good health at the date of the representations the policy should be deemed forfeited the same as if no attempt to revive it had occurred. The language is as follows: "If this representation shall prove in any respect untrue, said policy shall cease and be treated in the same manner as if it had not been revived." If there is any room for a rea-

sonable inference of fact that appellant did not rely upon that in issuing the renewal receipt, we confess inability to discover it. It might well have relied thereon and at the same time doubted Brooks' personal knowledge of the matter, or even believed that he did not possess any such knowledge; though we are unable to perceive any reason for holding that it did not suppose he made the certificate from his personal knowledge in respect to the matters therein contained.

Counsel for respondent point to the circumstance of appellant's complying with Brooks' request for a receipted bill to the Landreth Company, showing payment by it in full of the premium required to renew the policy, as of some significance. That does not in any way displace the stipulation as to the payment not being effectual to renew the policy in the event that the assured was not in fact in good health as represented. This is not like many cases found in the books, of money being merely conditionally received upon an overdue premium. It is much stronger in favor of the insurer in that it was expressly sent, as well as received, conditionally. Appellant was not requested, as in many cases, expressly or otherwise, to accept the money as upon a renewal of the policy absolutely. It was expressly stipulated, as before indicated, that the acceptance of the money should be of no effect if the condition that the assured was in good health as represented was not satisfied. In view of that there is no inconsistency between the condition upon which the money was paid and accepted and the mere evidence contained in the receipt to the Albert Landreth Company that the money had come to the hands of the appellant.

Respondent's counsel contend that the judgment is right regardless of the ground upon which the trial court rested it, because, in the letter of July 31, 1899, appellant called the executor's attention to the fact that the assignment to him did not bear the requisite amount of revenue stamps, and requested information as to whether the duplicate in the latter's

hands was in the same condition; and further, that the executor should furnish it a certified copy of Landreth's will and of the appointment of an executor thereof; and in response thereto $4 in revenue stamps were added to the duplicate assignment, and the papers requested were sent to appellant. Those circumstances, if unaffected by others, would operate to waive the forfeiture in question. They do not stand alone. In the letter referred to, the executor was distinctly informed that the forfeiture, caused by default in the April 10, 1899, payment, would be insisted upon, because the conditions upon which the policy was restored had failed. A probable or possible liability of the company, however, for $729 under the policy, was suggested, which it offered to pay, and to return the premium paid after default, such offer not to prejudice the rights of the company if not accepted. By section 7 of the policy, after forfeiture thereof it stood for the amount mentioned in appellant's letter upon condition of the same being applied for within twelve months after such forfeiture and the policy being surrendered to appellant. In view of that the evident meaning of appellant's letter is that it did not intend to waive the forfeiture in question, but did intend to recognize its conditional liability stipulated for as regards lapsed policies, not waiving the requirement as to application and surrender within twelve months from the date of the default causing the lapse. The request for information as to the validity of the assignment to the executor, and for certified copies of papers, was inconsistent with a waiver of forfeiture, since the executor was clearly informed it would be insisted upon. It was perfectly consistent with the existence of a valid claim upon the company for $729, which it offered to pay. Appellant did not, by the letter, mislead the executor into incurring expense or doing or omitting to do anything in the belief that the policy would be recognized as valid for any amount in excess of $729. In the attitude of appellant indicated by the letter and its subse-

quent course, we observe no shifting of positions as regards the forfeiture, to the prejudice of respondent or those for whom he stands; so the rule for which counsel contend does not apply. Such rule is effective where an insurance company, having once recognized the validity of a policy with knowledge of a defense thereto, denies its liability, the owner of the policy having in the meantime been misled, by the position first taken, into subjecting himself to some substantial loss. The cases in this court on the subject are very numerous. The following are but a few of them: *Kidder v. Knights Templars & M. L. I. Co.* 94 Wis. 538, 69 N. W. 364; *Cannon v. Home Ins. Co.* 53 Wis. 593, 11 N. W. 11; *Webster v. Phœnix Ins. Co.* 36 Wis. 67; *Jerdee v. Cottage Grove F. Ins. Co.* 75 Wis. 345, 44 N. W. 636; *Northwestern Mut. L. Ins. Co. v. Germania F. Ins. Co.* 40 Wis. 446; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108. The foundation principle of the rule is as well stated in *Cannon v. Home Ins. Co.* as anywhere in our decisions:

'An insurance company cannot be permitted to call upon a policy holder to do some act, indicating that the validity of the policy is conceded, and, after he has, in reliance thereon, gone to some expense and trouble, change its position and claim that the policy is not in force. Courts condemn such attempts to avoid liability, really by the doctrine of estoppel *in pais,* though more is said in the decisions on the subject about the doctrine of waiver than that of estoppel.'

In harmony therewith, courts have held that though a policy holder incurs some expense or is put to some inconvenience by responding to a call of the insurance company, with knowledge of facts rendering the policy void, its defense is not waived if the policy holder is in no way misled thereby,—if he is distinctly informed that the company will insist upon the forfeiture. There is no room in such a situation for the operation of the doctrine of estoppel *in pais.* There is no change of position to the prejudice of the policy holder, so there is no waiver of a known defense. *Freedman v. Fire*

Asso. 168 Pa. St. 249, 32 Atl. 39; *Boyd v. Vanderbilt Ins. Co.* 90 Tenn. 212, 16 S. W. 470; 4 Joyce, Ins. § 3370. Under our decisions an insurance company cannot save a known defense to a policy and put the owner of the policy to any substantial expense or inconvenience in respect to his claim in responding to its calls for proofs or requests, or doing some other thing in reasonable expectation of the validity of the policy being recognized, unless the attitude of the company in the matter be such as to so clearly inform the policy holder that it does not consider the policy claim valid, and the grounds thereof, and that the invalidity will be insisted upon, that the act of the policy holder must be deemed wholly voluntary. In *Cannon v. Home Ins. Co.* 53 Wis. 593, 11 N. W. 11, the attorney of the policy holder, in response to an inquiry of the company as to its position in regard thereto, was told that, if the assured supposed himself to be possessed of a valid claim against the company on the policy, he should present his proofs as required by the insurance contract, and that upon receipt thereof the matter would receive prompt attention by the company and its attitude in respect thereto be made known to the attorney. Proofs were furnished accordingly, and it was held that the company's reply effectually waived any defense to the policy of which it had knowledge at the time of such reply. In the letter relied upon here as the foundation for a waiver of the forfeiture, the policy holder was fully informed that the invalidity of the policy would be insisted upon, and the grounds thereof were stated. The position then taken, both as regards the defense of forfeiture and the rights of the executor upon the policy as a lapsed contract, was, as before indicated, consistent with the request for papers and information as to the validity of the assignment to the executor, and consistent with the subsequent attitude of the appellant in defending against respondent's claim.

Respondent's counsel further contend that appellant's con-

duct, as regards the premium paid after default, shows to a reasonable certainty an intention to waive the result of the default, or at least that the evidence pointing that way raised a question of fact for the jury, and that the verdict in that regard should be deemed conclusive. We do not consider that there is any finding by the jury to which the rule invoked by counsel can be applied. The verdict was taken by consent of both parties as a mere conclusion of law on facts assumed, for the time being, to exist for the purpose thereof. It was directed by the court with the understanding that the final result should wait upon the decision of the court upon all the issues of law and fact. The situation would not be different if a jury trial had been entirely waived and the case submitted to the court for decision. The verdict of the jury does not cut any figure in the case. We have already shown that what occurred before Landreth's death does not indicate that appellant intended to waive the forfeiture if the representations which accompanied the payment of the premium were false.

There is left to be considered the question of whether the attitude of appellant as regards the premium after it obtained knowledge of the falsity of the certificate of good health shows an intention to waive the forfeiture regardless thereof. It pertains to waiver, strictly so called. There is little or no element of estoppel involved therein. In the absence of such element affecting appellant's rights, it cannot properly be held to have waived them in the absence of proof showing that it had knowledge, at the time the waiver is claimed to have occurred, of all the material facts that would probably have then influenced its conduct. A waiver, strictly so called, is "the result of an intentional relinquishment of a known right." *Rice v. Fidelity & D. Co.* 103 Fed. 427; 2 Bacon, Ben. Soc. § 423; *Lewis v. Phœnix M. L. Ins. Co.* 44 Conn. 72, 91. Such intention may be shown by conduct as well as by express agreement. Conduct indicating a waiver may be so

inconsistent with a purpose to stand upon one's rights as to leave no room for a reasonable inference to the contrary. Then the intent to waive appears as a matter of law. It so appears in case of an unconditional acceptance of a premium on a policy of insurance after it has lapsed for nonpayment of the premium at the proper time or for any other cause to the knowledge of the company. It is otherwise where payment is accepted conditionally. In the former case the attitude of the insurer is inconsistent with any other theory than that it consents to a continuance of the policy. In the latter case its attitude may be inconsistent with any other theory than that it does not consent to such continuation except upon some condition agreed upon. If an insurance company receives a premium conditionally, after a forfeiture of the policy, and retains the same after obtaining knowledge of the nonexistence of facts satisfying the condition, that may constitute such an unqualified recognition of the policy as to evidence a waiver of the forfeiture as a matter of law, or it may not evidence such an intention at all, or there may be conflicting inferences in regard to the matter, presenting an issue of fact to be determined by court or jury, according as parties see fit to submit the controversy for decision. It has been held that a reasonably prompt offer to return a premium conditionally received, upon obtaining knowledge of the nonexistence of a fact essential to the condition, will, as a matter of law, prevent the receipt thereof from resulting in a waiver of a previous forfeiture; and that an unexplained retention of a premium paid after forfeiture, for a long time, with knowledge of all the facts, may, as a matter of law, result in a waiver of the forfeiture. *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 84 N. W. 159; *McQuillan v. Mut. R. F. L. Asso.* 112 Wis. 665, 87 N. W. 1069. Such authorities should not be taken to indicate that a premium received on a policy after it has lapsed must under all circumstances be returned before the assurer can interpose its defense. The evidentiary effect of

the retention of a premium, as regards indicating an intent to waive a forfeiture of a policy upon which it was paid, depends upon circumstances. As before stated, they may indicate such intent as a matter of law, or the contrary as a matter of law, or they may be such as to warrant a determination in regard to the matter either way. The circumstances of this case seem to come far short of showing any such intention. Knowledge of the falsity of the health certificate was not brought incontestably home to appellant until the proof of the claim on the policy was furnished. Within the time allowed for payment of the claim by the terms of the policy, and in the first communication in regard to the matter, from appellant to respondent, he was informed that it would insist that the policy was not in fact restored after the lapse on April 10, 1899, because of the false representations contained in the application for a renewal thereof. A few days thereafter appellant tendered the amount of the premium to the person through whom the money was received. True, the tender was not made to the proper person, but it has evidentiary significance as bearing on the question of whether the retention of the money was with the intention of waiving the forfeiture. When sued upon the policy, appellant acknowledged liability to return the premium. True, the allegation as to the premium having been paid into court for the benefit of respondent was false, still the unqualified acknowledgment of liability to return it remains. Taking all the circumstances together, we fail to see anything indicating a purpose on appellant's part to keep the premium as its own. Without such an intention, the mere retention of the money does not indicate intention to waive the forfeiture, since there is no element of estoppel involved. It has often been held that the mere retention of a premium paid to an insurance company upon a policy after forfeiture thereof, where the circumstances do not indicate an intent to appropriate the money to its own use as its own property, but do indicate a

willingness to account therefor as the property of the policy holder, even though the money be retained down to the final termination of the litigation in respect to the validity of the policy, does not prevent the company from prevailing upon the plea of forfeiture. *Rockwell v. Mutual L. Ins. Co.* 21 Wis. 548; *Harris v. Equitable L. Ass. Soc.* 6 Thomp. & C. (N. Y.) 108; *S. C.* 64 N. Y. 196; *Lewis v. Phœnix M. L. Ins. Co.* 44 Conn. 72. The retention of the money under such circumstances does not establish intention to waive a forfeiture, nor does the doctrine of restitution and rescission, as a condition precedent to the right to insist upon the forfeiture as a defense to an action upon the policy, apply. In this case rescission, strictly so called, was not necessary to appellant's defense, first, because the policy, by the very terms of the conditional revival thereof, was never in fact restored by the payment of the premium; second, because the equitable element of restoration and rescission was sufficiently complied with by appellant's willingness to account for the premium in the action, since it had constantly disclaimed ownership thereof and respondent's attitude was all the time such as to indicate that a tender would be useless. In *Lewis v. Phœnix M. L. Ins. Co., supra,* the following language was used: "If, with full knowledge of that fact [the cause of forfeiture], they accepted this premium, they would be bound by it. But if, as is probable, they first knew of it after a claim was made upon them for the sum insured, then the retention of the money while investigating the case, and pending litigation, could not be regarded as any evidence of a waiver or as constituting an estoppel." In *Rockwell v. Mutual L. Ins. Co., supra,* there was a conditional revival of the policy as in this case. The money paid to the company was retained by it with knowledge of the facts for a period of about ten months. The point was made that such circumstance waived the forfeiture, but the court does not appear to have considered the mere retention of the money as indicating a waiver.

In *Harris v. Equitable L. Ass. Soc., supra,* the court held, in effect, that in the absence of circumstances indicating an intention on the part of the insurance company to claim the money paid upon the policy after it was forfeited, as its own, after it obtained knowledge of the facts rendering the policy invalid, it was not precluded from prevailing on the plea of forfeiture; and that the plaintiff had no reason to complain because of the mere retention of the money, so long as the company showed willingness to account therefor in the action.

Our conclusions on that branch of the case last discussed are: (1) That, the condition upon which the premium was received having failed, the policy was not revived pursuant to the application therefor; (2) that the mere retention of the money paid to satisfy the past-due premium, in view of the undisputed evidence showing that appellant never intended to appropriate the same to its own use, does not indicate an intention to waive the forfeiture; (3) that, the policy having been revived conditionally, the failure of the condition *ipso facto* restored the former situation, the same as if it had never been disturbed, no act on the part of appellant as regards a return of the premium being necessary; (4) that the situation existing before the payment of the premium having been restored by failure of the condition upon which the revival of the policy depended, the doctrine of rescission and restoration does not apply to the case; (5) that the mere retention of the premium after obtaining knowledge of the facts, down to a time subsequent to the commencement of the action, coupled with a manifest purpose from first to last to account therefor to the owner of the policy whenever he would receive the same, especially in view of the attitude of the latter indicating that he would not accept a return of the premium in advance of an adjudication of his rights, does not tend to show, much less show, an intention to waive the forfeiture.

The offer to return the premium, contained in the answer, we look upon as an unqualified admission of liability to

plaintiff for the amount thereof. In view of the fact that the money was not actually paid into court, the case stands substantially the same in that regard as *Harris v. Equitable L. Ass. Soc.* 6 Thomp. & C. 108, where there was an offer of judgment in the answer for the amount of the premium, and it was held, inferentially, that a judgment accordingly might have been rendered and that such a judgment would have left plaintiff no reason to complain. We think that, there being an admission of liability, with no offer of judgment or payment of money into court in lieu thereof, respondent should have had judgment for the amount offered, with costs. The judgment should, therefore, be reversed and remanded with directions to render judgment in respondent's favor for $39.35 and interest thereon at the rate of six per cent. per annum from the date of the trial, and for costs.

By the Court.—So ordered.

MADDEN, Respondent, vs. KINNEY and others, Appellants.

April 27—May 13, 1902.

Appeal: Insufficient return.

Unless it appears by the certificate of the clerk that the return on appeal from an order of the court contains the papers used by each party on the application therefor, as provided by sec. 3050, Stats. 1898, the appeal will be dismissed.

APPEAL from an order of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Appeal dismissed.*

For the appellants there was a brief by *J. M. Gooding,* attorney, and *D. D. Sutherland,* of counsel, and oral argument by *Mr. Sutherland.*

Edward S. Bragg, for the respondent.

WINSLOW, J. This is an appeal from an order refusing to dissolve a preliminary injunctional order, and continuing the same in force until the further order of the court. The action was in equity, and was brought by the plaintiff, as a taxpayer and father of three children attending the public schools of Fond du Lac, against the members of the board of education and the superintendent of schools of said city, for the purpose of declaring void an order of the board changing certain text-books in said schools, and enjoining the carrying out of said order on the ground that the action of the board was fraudulent and illegal for reasons stated at length in the complaint. The action was brought by the plaintiff on his own behalf and on behalf of all others similarly situated. Upon the verified complaint, an order to show cause was granted why an injunctional order *pendente lite* should not be made, and in the meantime a temporary restraining order was made. The defendants appeared, and upon affidavits moved to dissolve the temporary restraining order. Both motions were heard at the same time, and the plaintiff at the hearing produced affidavits in reply to the affidavits of the defendants. After hearing the motion, the order appealed from was made, the order reciting that the motions were heard together "upon the bill of complaint and upon the affidavits read on behalf of the defendants and upon behalf of the complainant."

In response to the appeal two bundles of papers have been returned to this court, both certified by the clerk to contain the original and all the papers in the action which have been filed in his office. There is no certificate by the clerk that the "papers used by each party on the application" for the order appealed from are contained in either return. Sec. 3050, Stats. 1898. Thus we are unable to determine, either from the recitals in the order or from the clerk's certificate, that we have before us all of the papers which were used upon the motions and upon which the order was based. In such a

situation the rule is well established that the appeal must be dismissed. *Ryan v. Philippi,* 108 Wis. 254, 83 N. W. 1103, and cases cited.

By the Court.—Appeal dismissed.

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114 530
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THE STATE EX REL. ZILLMER, Plaintiff in error, vs. KREUTZBERG, Defendant in error.

February 1—June 19, 1902.

Constitutional law: "Liberty:" Right of private contract: Police power: Forbidding discharge of employee because member of labor union.

Ch. 332, Laws of 1899, so far as it makes it an offense for any person or corporation to "discharge an employee because he is a member of any labor organization," is not a valid exercise of the police power, but is an unwarranted interference with freedom in making private contracts, and is void as an infringement of the right to "liberty and the pursuit of happiness," guaranteed by the state and federal constitutions.

ERROR to review an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The defendant in error having been arrested upon a complaint charging him with having unlawfully discharged an employee because said employee was a member of a labor organization, and, upon hearing, having been committed for trial, he sued out a writ of *habeas corpus* against the sheriff, alleging the illegality of his imprisonment and restraint, for that the act of the legislature creating the offense (ch. 332, Laws of 1899) is unconstitutional, because it violates the following provisions of the constitutions of the state of Wisconsin and of the United States:

(1) That "all men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, govern-

ments are instituted among men, deriving their just powers from the consent of the governed."

(2) That no person shall be deprived of life, liberty, or property without due process of law.

(3) The constitutional provision forbidding the legislature to grant any special or exclusive rights, privileges, or immunity to any individual, corporation, or association.

(4) The provision of the fourteenth amendment to the constitution of the United States, providing, "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The sheriff returned that he held the defendant upon a commitment of the examining magistrate for trial upon a charge as above described. The superior court held the law unconstitutional, and the commitment of the defendant therefore beyond the jurisdiction of the examining magistrate, and ordered discharge from imprisonment, to which order or judgment the sheriff of Milwaukee county and the state of Wisconsin sued out writ of error from this court.

For the plaintiff in error there was a brief by *W. H. Bennett,* district attorney, and *Francis E. McGovern,* assistant district attorney, and oral argument by *Mr. McGovern* and *Mr. C. E. Buell,* first assistant attorney general.

For the defendant in error there was a brief by *Nath. Pereles & Sons,* attorneys, and *G. D. Goff,* of counsel, and oral argument by *Mr. Goff.*

DODGE, J. In this case we are confronted with that gravest of sociological questions: How far, consistently with freedom, may the rights and liberties of the individual member of society be subordinated to the will of the government? That question has been at war from the very first existence of any form of government. For many centuries, while debated as an ethical and philosophical question, it was resolved

in each instance by force or by the ability to exert force. A little more than a century ago the attempt was made by the American people to define the limits by written contract, and to withdraw their decision and vindication from the arena of physical strife and transfer it to the peaceful forum of the judiciary. In line with that attempt, the people of what is now the commonwealth of Wisconsin, some sixty years ago, formulated their constitution. Their purpose, unquestionably, was to create a government endowed with the essential attributes of sovereignty. The very preamble declares that it is adopted in order to secure the blessings of liberty and form a more perfect government. In the organization of that government it was provided that the legislative power shall be vested in a senate and assembly. Const. art. IV, sec. 1. By a long line of decisions and *consensus* therein by the people of the various states, it has become settled that thereby all powers of a legislative character ordinarily enjoyed by sovereign governments became vested in the state legislature, except so far as restrained expressly or by substantially necessary implication elsewhere in the constitution. Cooley, Const. Lim. 201, 206; 1 Tiedeman, Cont. of Pers. & Prop. 9. The very first section of that constitution, however, declares the purpose of the government about to be created by it in these words:

"All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

At this late day it cannot be doubted that this declaration of the purpose to be accomplished is to be construed as a limitation upon the powers given. By the preamble, preservation of liberty is given precedence over the establishment of government. It would be inconceivable that the people of Wisconsin, in establishing a government to secure the rights

of life, liberty, and the pursuit of happiness, should by general grant of legislative power have intended to confer upon that government authority to wholly subvert those primary rights; and in this view it has been held by this court that legislative acts conflicting with that declared purpose are forbidden by the constitution, and must be denied efficacy by the courts. *Durkee v. Janesville,* 28 Wis. 464, 471; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 435, 87 N. W. 561. We say by the courts, for elsewhere in the constitution the judicial power is vested in them; and that the judicial power, and therefore the judicial duty, includes repudiation of an attempted act of legislation prohibited by the constitution, was declared by the supreme court of the United States, at the pen of Chief Justice MARSHALL, in *Marbury v. Madison,* 1 Cranch, 137, and had, before the adoption of our constitution, become settled by a long line of authority. 1 Kent, Comm. 449; Cooley, Const. Lim. ch. 7; *Baily v. Gentry,* 1 Mo. 116; *Bloodgood v. M. & H. R. Co.* 18 Wend. 9; *Dartmouth College Case,* 4 Wheat. 518, 625.

A question which immediately arises in the consideration of any act of the legislature restraining individuals is the exact meaning of the words, "life, liberty and the pursuit of happiness," which are to be secured by the government, and must not be destroyed by it. That these words are not to be taken in their absolute sense is, of course, obvious. Individuals may, notwithstanding this prohibition, be deprived of life or liberty as punishment for crime, and they may be deprived of some measure of property or of happiness in deference to and protection of the welfare of the whole community. Indeed, most of the legislative acts which fill our statute books detract in some measure from the absolute freedom of the individual to act wholly at the dictate of his will, and yet are of either decided or fully recognized constitutionality. On the other hand, these words in the constitution are not to receive an unduly limited construction. It has become settled,

for example, that "liberty" does not mean merely immunity from imprisonment, and that "property" is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own affairs, so far as consistent with rights of others; and within the latter, those rights of possession, disposal, management, and of contracting with reference thereto, which render property useful, valuable, and a source of happiness, right to pursuit of which is preserved. 2 Story, Const. (5th ed.) § 1950; Cooley, Torts, 278; 2 Tiedeman, Cont. of Pers. & Prop. 939; *Butchers' Union S. & L. L. Co. v. Crescent City L. & S. Co.* 111 U. S. 746, 757, 4 Sup. Ct. 652; *Allgeyer v. Louisiana,* 165 U. S. 578, 589, 17 Sup. Ct. 427; *Niagara F. Ins. Co. v. Cornell* (C. C.) 110 Fed. 816, 822; *State v. Julow,* 129 Mo. 163, 31 S. W. 781; *Ritchie v. People,* 155 Ill. 98, 40 N. E. 454; *Gillespie v. People,* 188 Ill. 176, 58 N. E. 1007; *Comm. v. Perry,* 155 Mass. 117, 28 N. E. 1126; *In re Jacobs,* 98 N. Y. 98; *People ex rel. Rodgers v. Coler,* 166 N. Y. 1, 59 N. E. 716; *Janesville v. Carpenter,* 77 Wis. 288, 301, 46 N. W. 128.

In *Allgeyer v. Louisiana, supra,* the court said by Mr. Justice PECKHAM:

"The liberty mentioned in that [fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

In *Carew v. Rutherford,* 106 Mass. 1, 14, it is pointed out that the very existence of the ordinary labor union rests upon

the inherent liberty of individuals to contract or refuse to do so, otherwise such organizations would be criminal at common law. In that case, too, are collected actual instances of governmental restriction of liberty deemed legitimate before our constitutions, but now clearly prohibited thereby. Some of these are acts making it criminal to take excessive wages; requiring handicraftsmen, meet to labor, to work by the day for their neighbors in certain work; fixing the price of labor; and the like.

In *Allen v. Flood* [1898] App. Cas. 1, the complaint was that certain union iron-workers confederated and threatened to quit unless certain non-members were discharged. In the course of the opinion of HERSCHELL, J., it was said: "A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection, as a man's right to trade or work;" and in the same case, by Lord WATSON: "It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work."

In *Doremus v. Hennessy,* 176 Ill. 608, 52 N. E. 924, where the employer refused to abide by the prices prescribed by a laundry union, and the members of the union refused to work for her, the court sustained them in so doing, and said: "Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will."

In the somewhat famous case of *Arthur v. Oakes,* 11 C. C. A. 209, 63 Fed. 310, wherein the circuit court, during the labor troubles of 1894, enjoined certain employees from "so quitting . . . as to cripple the property or prevent or hinder the operation of said railroad," the court of appeals, speaking by HARLAN, J., held that was erroneous, as invading the natural rights of men. He said: "It would be an in-

vasion of one's natural liberty to compel him to work for, or to remain in the personal service of, another." "The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character." It was there further held that it was error to enjoin the employees from "striking," for the reason that included in the meaning of the word "strike" was the mere concurrence of a number of individuals, in the exercise of their inherent right, to quit their employment, which no court ought to interfere with unless they were bound by contract.

Judge Cooley (Torts, p. 278) says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."

Mr. Tiedeman (2 Cont. of Pers. & Prop. § 204) says: "Every man has a natural right to hire his services to any one he pleases, or refrain from such hiring; and so, likewise, it is the right of every one to determine whose services he will hire. . . . Governments, therefore, cannot exert any restraint upon the actions of the parties."

But however well established that the words "liberty" and "pursuit of happiness" include the right of private contract, so that a deprivation of the latter is a deprivation of each of the former, yet the far more difficult question remains whether any given statute constitutes a *forbidden* deprivation. As we have already said, the constitutional restriction in this respect is not absolute. The very existence of government renders imperative a power to restrain the individual to some extent. This is called the "police power," of which definition has been attempted by jurists and text-writers with so little success as to well-nigh discourage further attempts. It may

be described, though not defined, as the power of the government to regulate conduct and property of some for safety and property of all. But in what degree? In a despotism, absolutely in the discretion of the despot. In a less than despotism, not absolutely, but with *some* limitations. To ascertain and declare those limitations scientifically is, and for long to come will be, the despair and struggle of courts. The present period witnesses unexampled popular consideration and, apparently, belief in the widest scope of governmental activity and interference with the individual. That tendency has affected, and of course will further affect, the legislative representatives of the people, who will undoubtedly deem it their duty to attempt to give it effect in the laws they make. With this tendency as a *policy* of government, courts have nothing to do. If the popular belief in a despotic or a socialistic form of government, such as demands complete surrender of individual liberty, is strong enough and general enough to lead the people to delegate it to the legislature, authority to enforce such surrender will exist, and courts must give full effect to the laws enacted under it. That authority has not yet been given, however; and until the people, in the prescribed manner, shall amend the constitution, the theory of government now written therein must control, and courts must enforce its limitations against legislative attempts to exceed them. While the judiciary is not the guardian of civil rights or liberty in the abstract, it is the guardian of so much thereof as by constitutional restrictions the government is forbidden to disturb.

By the constitution is granted the police power,—the power to restrain the individual of some measure of his liberty of action and of his property; but this goes no further than to authorize the enactment of laws necessary to reasonable protection of the safety and welfare of the general community, and not depriving the individual of liberty in the constitutional sense. By the same instrument, liberty is guaranteed

to the individual; but that means only civil liberty,—that measure of freedom which may be enjoyed in a civilized community consistently with peaceful enjoyment of like freedom in others. Absolute freedom in one is necessarily subversive of liberty for those with whom he comes in contact, unless such others be strong enough to resist and curtail his will. The liberty of one man begins where another's terminates. Such definitions as the foregoing, however, do not greatly advance us toward any *a priori* location of a line of demarcation. They amount to little more than a declaration that police power extends to such measure of restraint as is consistent with liberty; and liberty, that measure of freedom consistent with the police power. This impossibility of exact demarcation characterizes all discussion of the subject, yet the careful expressions of these alternative conceptions of properly limited government, on the one hand, and due freedom from restraint, on the other, are useful when we approach a concrete case. Therefore quotations of some such expressions may be helpful.

The conception of civil liberty has been variously phrased thus: "Every man may claim the fullest liberty to exercise his faculties, compatible with the possession of like liberty by every other." Spencer's Social Statics, 94. "That man is free [under the law] who is protected from injury." 2 Webster's Works (Boston, 1854), 393. "Liberty consists in doing what we ought to will, and in not being constrained to do what we ought not to will." Montesquieu. "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others." FIELD, J., in *Crowley v. Christensen,* 137 U. S. 86, 89, 11 Sup. Ct. 13. "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint." STORY, J., in *Wilkinson v. Leland,* 2 Pet. 627.

The conception of the function of government to restrain liberty under the police power has called forth the following attempts at expression and definition: "The police power of the state . . . is co-extensive with self-protection, and is not inaptly termed the 'law of overruling necessity.' It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." *Lake View v. Rose Hill C. Co.* 70 Ill. 191. It is said to be limited only by the legislative discretion, "provided its acts do not go beyond the great principle of securing the public safety." *State v. Noyes,* 47 Me. 189. "If . . . a statute purporting to have been enacted to protect the public health [etc.] has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge." HARLAN, J., in *Mugler v. Kansas,* 123 U. S. 623, 661, 8 Sup. Ct. 273. It is said that laws conflicting with express constitutional prohibitions "can be only such as are so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not . . . have intended to prohibit their exercise in the particular case." CHRISTIANCY, J., in *People v. J. & M. P. R. Co.* 9 Mich. 285. "It must appear, first, that the interests of the public generally, as distinguished from a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals." *Lawton v. Steele,* 152 U. S. 133, 14 Sup. Ct. 499. "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Id.* "Cannot change innocence into guilt, or punish innocence as a crime." CHASE, J., in *Calder v. Bull,* 3 Dall. 386. "Any law which goes beyond

that principle [*Sic utere tuo ut alienum non lædas*]— which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security—cannot be included in the police power of the government." Tiedeman, Cont. of Pers. & Prop. 5. "The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment." *Ruhstrat v. People,* 185 Ill. 133, 57 N. E. 41. "Of course, for reasons of public policy, matters of immorality and crime cannot be the subject of contract. But it is not for the legislature alone to declare public policy. If this were so, then any contract can be denounced as against public policy, and the evils our fathers sought to be rid of are with us again." *Niagara F. Ins. Co. v. Cornell* (C. C.) 110 Fed. 816, 822. "The police power of the state extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society." CASSODAY, J., in *State v. Heinemann,* 80 Wis. 253, 256, 49 N. W. 818.

Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. That the present act curtails it directly, seriously, and prejudicially, cannot be doubted. The success in life of the employer depends on the efficiency, fidelity, and loyalty of his employees. Without enlarging upon or debating the relative advantages or disadvantages of the labor union, either to its members or to the community at large, it is axiomatic that an employer cannot have undivided fidelity, loyalty, and devotion to his interests from an employee who has given to an association right to control his conduct. He may by its decisions be required to limit the amount of his daily product. He may be restrained from teaching his art to others. He

may be forbidden to work in association with other men whose service the employer desires. He may not be at liberty to work with such machines or upon such materials or products as the employer deems essential to his success. In all these respects he may be disabled from the full degree of usefulness attributable to the same abilities in another who had not yielded up to an association any right to restrain his freedom of will and exertion in his employer's behalf according to the latter's wishes. Such considerations an employer has a right to deem valid reasons for preferring not to jeopardize his success by employing members of organizations. A man who has by agreement or otherwise shackled any of his faculties—even his freedom of will—may well be considered less useful or less desirable by some employers than if free and untrammeled. Whether the workman can find in his membership in such organizations advantages and compensations to offset his lessened desirability in the industrial market is a question each must decide for himself. His right to freedom in so doing is of the same grade and sacredness as that of the employer to consent or refuse to employ him according to the decision he makes. We must not forget that our government is founded on the idea of equality of all individuals before the law. Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employee. In answering the question now before us, we may not forget the possibility of being called on to answer whether the legislature may make a criminal of the employee who quits, for example, because his employer joins a blacklisting association; because nonunion men or members of some other union are employed, or nonunion or forbidden machines or materials are used; because of an obnoxious foreman; because excessive hours of work are required; because compelled to trade at employer's store or board at his boarding house; or because of any other fact or conduct now considered entirely

adequate reason for refusing or leaving a particular service. If must not be forgotten, if, as counsel for the state argues, the laborer is too weak to meet the employer on equal terms in the field of contract, that he will be far more subject to the latter's control and oppression in the field of politics, and that laws of the above character will surely come, if within the proper province of the legislature, unless, as we have faith to believe, the character and the individuality of the wage earners of the country are sufficient to maintain their independence—both contractual and political—in a field of equal rights under the law, and of full liberty to each to sell and buy labor to and from whom he will.

As already mentioned, recent times have witnessed much increase in legislative activity in the way of interference with individual conduct, and especially with transactions between employer and employee. The views of the courts as to the constitutionality of many such laws are in serious conflict, as illustrated by the following decisions: Statute and common-law prohibition against conspiracies have generally been held invalid so far as they merely prohibit the employee from quitting individually or in concert with others. *Arthur v. Oakes,* 11 C. C. A. 209, 63 Fed. 310; 1 Tiedeman, Cont. of Pers. & Prop. 424, where it is said: "No law could deny him this right, without violating the constitutional principle of liberty of contract, unless he has been engaged to serve for a definite period of time." An act forbidding deductions from wages because of defective work is held invalid; so far as it interferes with the making of contracts for employment, in *Comm. v. Perry,* 155 Mass. 117, 28 N. E. 1126. Acts regulating the time of payment of wages in defiance of contract are held valid in *Skinner v. G. M. Co.* 96 Fed. 735, and in *Opinion of Justices,* 163 Mass. 589, 40 N. E. 713, but invalid in *Leep v. St. L., I. M. & S. R. Co.* 58 Ark. 407, 427, 25 S. W. 75, and *Braceville Coal Co. v. People,* 147 Ill. 66, 35 N. E. 62. Acts in mining regions requiring that payment

shall be based upon coal without screening, so far as they prohibit contracts to the contrary, are held invalid in *Ramsey v. People,* 142 Ill. 380, 32 N. E. 364, and *Re Preston,* 63 Ohio St. 428, 59 N. E. 101; valid in *State v. Wilson,* 7 Kan. App. 428, 53 Pac. 371. Acts prohibiting payment in orders are held unconstitutional, as invading the liberty of contract, in *State v. Haun,* 61 Kan. 146, 59 Pac. 340; *Frorer v. People,* 141 Ill. 171, 31 N. E. 395; *State v. Loomis,* 115 Mo. 307, 22 S. W. 350; *Godcharles v. Wigeman,* 113 Pa. St. 431, 6 Atl. 354; and valid in *Dayton C. & I. Co. v. Barton,* 103 Tenn. 604, 53 S. W. 970; *Harbison v. Knoxville I. Co.* 103 Tenn. 421, 53 S. W. 955; *Knoxville I. Co. v. Harbison,* 183 U. S. 13, 22 Sup. Ct. 1; also in *Hancock v. Yaden,* 121 Ind. 366, 23 N. E. 253, but in the last case on the ground that the state has the right to prohibit the use of anything except legal tender to circulate as money. Statutes limiting hours of labor have been held invalid, as infringing the right of contract, in *Low v. Rees P. Co.* 41 Neb. 127, 59 N. W. 362, and *Ritchie v. People,* 155 Ill. 98, 40 N. E. 454, on the ground that his labor is the property of the workingman, and government has no power to restrict him in selling it as he deems most to his advantage. Such legislation is held valid in *Holden v. Hardy,* 169 U. S. 366, 18 Sup. Ct. 383, with reference to labor in mines, on the ground that long hours are prejudicial to health, and therefore within proper regulation, under the police power, to preserve the general health. An act prohibiting farriers from shoeing horses without first obtaining a license is held unconstitutional in Illinois. *Bessette v. People,* 193 Ill. 334, 62 N. E. 215, 219.

The nearest parallel we have found to the act in question are laws enacted in Missouri and Illinois, nearly identical with our law as it existed before the amendment of 1899, namely, making criminal attempts to coerce employees against membership in labor unions, by discharge or otherwise. In *State v. Julow,* 129 Mo. 163, 31 S. W. 781, such law was held

unconstitutional as unduly invading the liberty of the employer to make or refuse to make contracts with whom he pleased. In that case the act committed was merely discharging an employee, and it was contended that it was prohibited by the law. The court said: "If an owner," etc., "obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may. . . . We deny the power of the legislature to do this; to brand as an *offense* that which the constitution designates and declares to be a *right,* and therefore an *innocent* act.". And further: "Nor can the statute escape censure by assuming the label of a police regulation. It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote, or tend to promote, the public health, welfare, comfort, or safety; and, if it did, the state would not be allowed, under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgment." In *Gillespie v. People,* 188 Ill. 176, 58 N. E. 1007, was considered a similar act, claimed to be breached by discharging an employee because he was a member of a certain labor organization. That court also held the act unconstitutional, adopting substantially the views of the Missouri court in the preceding case. The court said: "One citizen cannot be compelled to give employment to another citizen, nor can any one be compelled to be employed against his will. The act . . . now under consideration deprives the employer of the right to terminate his contract with his employee. The right to terminate such a contract is guaranteed by the organic law of the state. The legislature is forbidden to deprive the employer or employee of the exercise of that right. The legislature has no authority to pronounce the performance of an innocent act criminal, when the public health, safety, comfort, or welfare is not interfered with." "Liberty

includes not only the right to labor, but to refuse to labor, and consequently the right to contract to labor or for labor, and to terminate such contracts, and to refuse to make such contracts."

On this subject Mr. Tiedeman (Cont. of Pers. & Prop. 332) declares the opinion that a state statute which made it unlawful for an employer to refuse to employ union men, or to compel an employee to withdraw from a trade union on pain of dismissal, would be clearly unconstitutional. In Georgia a statute requiring an employer to give to a discharged workman a certificate stating the reasons of the discharge is held unconstitutional on the ground that the right of discharge may be exercised without any reason or explanation. *Wallace v. G., C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579. In Missouri the same principle on which an act prohibiting discharge of men by reason of membership in unions was held unconstitutional in the *Julow Case, supra,* is held to preclude interference with members of a union in soliciting others to refuse to trade with a manufacturer. *Marx & H. J. C. Co. v. Watson* (Mo. Sup.), 67 S. W. 391. In New York, union men are held not liable for compelling discharge of non-unionists by threats to strike. *National Pro. Asso. v. Cumming,* 170 N. Y. 315, 63 N. E. 369. Many other illustrations might be given, but the foregoing suffice to show the confusion among different courts, and probably the general tendency on such subjects.

In considering our own statute under which relator is committed, it must first be noted that we are concerned only with that portion added to pre-existing statutes (sec. 4466*b*, Stats. 1898) by the act of 1899, "No person or corporation shall discharge an employee because he is a member of any labor organization," for the relator is not charged with breach of any other of the provisions of that act. Confining ourselves, then, to the act so charged and the statutory prohibition in-

volved, is it within the legislative power to make criminal the refusal to contract with another for his labor for any reason which the employer deems cogent? We speak of refusal to contract, for, while the act mentions only discharge, it is in no wise limited to situations where there is any contract or other right to continuance of employment, and is obviously intended by the framers to apply generally to the relation of employer and employee, where, as common knowledge assures us, there is usually no term of employment and each day constitutes a new contract. As each morning comes, the employee is free to decide not to work, the employer to decide not to receive him, but for this statute. That the act in question invades the liberty of the employer in an extreme degree, and in a respect entitled to be held sacred, except for the most cogent and urgent countervailing considerations, we have pointed out. Hardly any of the personal civil rights is higher than that of free will in forming and continuing the relation of master and servant. If that may be denied by law, the result is legalized thralldom, not liberty,—certainly not to the laboring men of the country. This aspect of the subject is too clear to warrant further discussion. Is there any conceivable reason to warrant such extreme invasion of individual liberty? Can it be necessary to the reasonable liberty of others under the law? The act here charged as criminal clearly does not deprive any other person of any private or civil right. Its utmost effect is to deny privilege of contract, but no right exists to enter into contract with another against his will. The maxim, *Sic utere tuo ut non alienum lædas,* cannot justify restraint of acts which do not injure others in their legal rights. We therefore find entirely lacking one of the requisites of the police power to restrain conduct, declared by many authorities to be an essential, namely, that such conduct shall injuriously affect the rights of others. 1 Tiedeman, Cont. of Pers. & Prop. 5; *Ruhstrat v. People,* 185 Ill. 133, 57 N. E. 41; *Niagara F. Ins. Co. v. Cornell* (C. C.) 110 Fed. 816.

But though not directly injurious to the rights of other individuals, is the forbidden act injurious to the welfare of the community? Is its prohibition so essential to the existence of good government that we must assume the constitution builders intended the liberty which they reserved should be subject to it? Or does it so tend to promotion of public peace or safety that we can reasonably attribute to the legislation such a purpose? After most careful consideration, we find ourselves unable to reach an affirmative answer to any of these queries. We have sought to give to the legislature the benefit of every doubt. We have examined the decided cases in great number; we invited counsel for the state to suggest, and we have given loose to our own invention and imagination; but we are unable to discover reason to think that the legislation is needful for or even calculated to protect public welfare, though cogent reasons to the contrary readily present themselves. Those courts which have sustained the various laws above mentioned, interfering in some degree with freedom of contract, when they have discussed the subject, have found some respect in which the public were interested, or thought to be. Thus, in forbidding the screening of coal before weighing, the legislature was held to be exercising merely the recognized governmental function of regulating weights and measures. *State v. Wilson,* 7 Kan. App. 428, 53 Pac. 371; *Yates v. Milwaukee,* 12 Wis. 673. Limiting hours of labor in mines or of children in factories has been justified by the peril to general health. *Holden v. Hardy,* 169 U. S. 366, 18 Sup. Ct. 383. Prohibition of payment in orders has been sustained upon the governmental power to regulate current money. *Hancock v. Yaden,* 121 Ind. 366, 23 N. E. 253. In Wisconsin, laws have been treated as or declared valid, though restricting freedom in conducting business, when was apparent a purpose of promoting or protecting public health in (slaughter houses) *Taylor v. State,* 35 Wis. 298; (pharmacists) *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818;

(plumbers) *State ex rel. Winkler v. Benzenberg,* 101 Wis. 172, 76 N. W. 345; (physicians) *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561. Obviously, however, none of these considerations can be involved in the policy underlying the legislation now under consideration.

One menace to public welfare was suggested by counsel for plaintiff in error, based upon the assertion that discharges of employees, especially union men, are likely to be followed by turbulence, violence, and even bloodshed; hence that it was proper to deprive employers of their rights, presumably because they are ordinarily law-abiding and will not make trouble. We decline to acknowledge as a fact that the laboring men, as a class, union or nonunion, are more prone to lawbreaking or violence than other classes of the community, or to adopt the theory that the legislature so assumed. But even if that assumption were made, it would constitute no justification for depriving one man of his liberty of contract, that another was likely to commit crimes or breaches of the peace. As well deny the right of private ownership of chattels because they tempt the thief to steal. Neither the restriction imposed nor the penalty is at all relevant to the public purpose sought, nor to the wrongful acts threatened. Nevertheless the suggested purpose seems to have had weight with the supreme court of Tennessee in *Harbison v. Knoxville I. Co., supra* (103 Tenn. 443, and 53 S. W. 960), as justifying an act compelling mining employers to pay in money orders for coal issued to their workmen. Whether the characteristics of wage earners in Tennessee or the conception of liberty are such as to warrant the decision must be left to the courts there. We cannot so view them in Wisconsin. It is the reservation of liberty and pursuit of happiness made by our own constitution, thus limiting the police power conferred upon our legislature, by which we must be controlled. Thereunder we hold that freedom to make, and even more to refuse to make, contracts, whereby no rights of others suffer, cannot be restricted,

unless otherwise will result substantial disturbance of the public health, safety, or welfare, and that even a possible tendency of some persons to wrongfully disturb the peace when thwarted of their will constitutes no justification for restraining others of their just rights; nor, if so, is the present act at all calculated or reasonably necessary to prevent the only suggested menace to the community.

As the legislation clearly and beyond doubt invades the natural liberty of the individual, it must be void, unless we can discover both the existence of a public need, and at least tendency of the statute to provide therefor. In the search for such need and purpose we must and do concede to the legislative branch of the government the fullest exercise of discretion within the realm of reason, and, if a public purpose can be conceived which might rationally be deemed to justify the act, the court cannot further weigh the adequacy of the need or the wisdom of the method. When, however, after all diligence and reflection, we are unable to discover any such public need or purpose, we have no alternative conclusion, save that the legislature has, "under the guise of protecting public interests, arbitrarily interfered with private business and imposed unusual and unnecessary restrictions upon lawful occupations," which it may not do. *Lawton v. Steele,* 152 U. S. 133, 14 Sup. Ct. 499. It has, then, taken from one his liberty and property, not for a public purpose, but for the benefit of other individuals, which is but robbery under the forms of law. *Citizens' S. & L. Asso. v. Topeka,* 20 Wall. 655, 664.

The act of 1899 is further assailed upon the charge that it is class legislation, not affecting alike all persons similarly situated and conditioned, and therefore prohibited by the requirement of art. I, sec. 1, of our constitution,—that *equal* freedom be preserved to all men,—discussed in *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561, and *Black v. State,* 113 Wis. 205, 89 N. W. 522. This objection was sustained in *State v. Julow,* 129 Mo. 163, 31 S. W. 781, and

Gillespie v. People, 188 Ill. 176, 58 N. E. 1007; but, as we have reached the conclusion that the legislation is not within the police power of this state at all, we need not consider whether the attempted exercise of that power is defective.

We agree with the trial court that the enactment under consideration exceeded the limitations imposed by the constitution of Wisconsin upon the legislature. It is therefore void, and conferred no power upon the magistrate to make the commitment under which petitioner was held in custody. His discharge therefrom was not error.

By the Court.—The order of the superior court of Milwaukee county is affirmed.

LEE, Respondent, vs. HAMMOND, Appellant.

February 18—June 19, 1902.

Criminal conversation: Evidence: Death of wife: Instructions to jury: Damages: Connivance of husband: Arguments to jury: Appeal: Exceptions.

1. In an action for criminal conversation with plaintiff's wife, evidence that, after the alleged adultery and prior to the commencement of the action, he had obtained a divorce from her, was admissible.
2. In such action it was not error to permit plaintiff to prove the death of his wife.
3. Plaintiff having offered to prove that after the divorce his wife came to her death by suicide, an objection was sustained and the jury were directed to disregard the statements of counsel as to the offer. *Held*, that there was no error prejudicial to defendant.
4. An exception to the whole charge to the jury on the ground that it assumes the existence of facts in dispute, without specifying any particulars, is too general to receive consideration.
5. The court having charged the jury that if they found defendant had not been guilty of the wrong complained of that would end their consideration of the case and they should return a ver-

dict in his favor, and that they should not find for the plaintiff unless they were convinced from all the evidence of the defendant's guilt to a reasonable certainty, a further charge on the subject of damages, preceded by language to the effect that if they found from the evidence that defendant had committed the wrong then they should consider and determine the amount of damages, etc.—is *held* not to have been erroneous as assuming that defendant was guilty.

6. It is not error to refuse to give an instruction which is given in the general charge.
7. A husband is not chargeable with connivance or consent merely because, after having reason to suspect his wife of infidelity, he vigilantly seeks proof of her unchastity, leaving open the opportunities already existing, but not making new ones or inviting the wrong.
8. Defendant in an action for criminal conversation having called for the production of all letters purporting or claimed to have been written by him to plaintiff's wife, and having denied that he wrote the letters produced, afterwards testified that he supposed there were some such letters. From this admission plaintiff's counsel argued to the jury that defendant knew all the time that he had written the letters. *Held*, that this was in the line of legitimate argument.
9. Statements of counsel in the argument to the jury in an exciting trial, resulting apparently from an honest misunderstanding of the opening statement by the opposing counsel and of the evidence, are *held* not to constitute in this case a material error.
10. In an action for criminal conversation it appeared that plaintiff had obtained a divorce from his wife and that she had afterwards died, and there was some claim that she had committed suicide. In the argument to the jury defendant had stated that plaintiff had sent her to her grave; that he wanted to get rid of her, that he might feed on new pastures; and that plaintiff was a blackmailer, a cuckold, a procurer, and was making merchandise of his wife's dishonor. Plaintiff's counsel in closing said defendant was a seducer and murderer. The court sustained an objection, saying there was no evidence upon which the statement that defendant was a murderer could be based. *Held*, that there was no error prejudicial to defendant. DODGE, J., dissents, being of the opinion that the conduct of plaintiff's counsel in impressing upon the jury by questions the fact that plaintiff's wife had committed suicide, and then asserting that defendant was a murderer, was improper and prejudicial, in view of the large verdict, including punitory damages.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the briefs of *Frawley, Bundy & Wilcox,* and for the respondent on that of *Wickham & Farr.*

CASSODAY, C. J. This action was commenced November 23, 1899, to recover damages for criminal conversation with the plaintiff's wife, alleged to have been committed at Eau Claire at divers times between September 15, 1899, and November 18, 1899. The complaint alleges the marriage of the plaintiff to Jennie E. Smith, March 8, 1891, and that from the time of such marriage to the time of committing the acts complained of they lived happily together as husband and wife; that between the dates mentioned the defendant wickedly and maliciously seduced, debauched, and criminally knew the plaintiff's wife, Jennie E., and thereby deprived the plaintiff of her affections, society, and assistance, to his great distress of body and mind and damage. The answer admits the marriage, and that the plaintiff and his wife had lived together as husband and wife, but otherwise denies each and every allegation of the complaint. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his compensatory damages at $6,000, and found that the plaintiff was entitled to recover $4,000 for punitory damages. In pursuance of an order of the court, judgment was entered thereon in favor of the plaintiff for $10,000 damages, and costs as taxed. From that judgment the defendant appeals.

The evidence on the part of the plaintiff tends to prove that his wife was twenty-seven years of age at the time of the trouble in question; that he was ten years older; that they had lived together happily as husband and wife for eight years; that in the winter of 1898–99, the plaintiff visited his old home in Maine for a couple of months; that during that time an intimacy sprung up between his wife and the defendant,

which continued down to the time of the trouble mentioned; that September 1, 1899, the plaintiff became suspicious that his wife's conduct with the defendant was not such as it should have been; that about November 9, 1899, he found three letters in an envelope on his wife's dresser in their sleeping room, dated, respectively, October 4, 1899, October 27, 1899, and November 7, 1899, which letters he knew to be in the handwriting of the defendant, with which he was familiar; that two of the letters were signed "Mrs. B.," and the other "Mrs. Brown," from which he became convinced that she had been guilty of criminal intercourse with the defendant; that he concealed his suspicion and conviction in order to obtain evidence of the fact; that November 18, 1899, after 8 o'clock in the evening, and after the light had been put out in the defendant's office, the plaintiff saw his wife go to the defendant's office, where the defendant was at the time, and, after remaining there for a while, she came away; that, soon after, he met his wife on the street, and informed her that he would not be at home that night, and he never lived with her afterwards; that November 22, 1899, he commenced an action for a divorce, and a judgment was entered therein on default in December, 1899; that March 24, 1900, the plaintiff's wife, Jennie E., died at Daytona, in the state of Florida, and her body was brought to Eau Claire and buried.

In admitting and excluding evidence in such a case, regard is always to be had to the nature of the action. As stated by a standard text-book, to recover it is essential for the plaintiff to prove the fact of marriage and the fact of adultery.

"The essential injury to the husband consists in the defilement of the marriage bed. The loss of the *consortium* is presumed, although the wife may have herself been the seducer, or may not have been living with the husband." 8 Am. & Eng. Ency. of Law (2d ed.) 268.

The same work declares that: "The right of the husband to recover is not affected, *except in the matter of damages,*

whether the intercourse be accomplished with the consent of the wife or forcibly against her will." *Id.* 262. Of course, the compensatory damages must necessarily be governed by the value of such loss of *consortium.* Hence the terms upon which the husband and wife lived together previous to the alleged adultery, their relations to each other, her chastity, character, and conduct, her condition of health, are proper subjects of inquiry on the question of damages. *Id.* 270–272.

1. Error is assigned because the court admitted testimony that the plaintiff had procured a divorce from his wife. The evidence to that effect seems to have been given without any objection. The plaintiff, having testified that he did not live with his wife after the occurrence of November 18, 1899, was asked this question: "Did you get a divorce from her after that?" Counsel for the defendant at first objected, but before the court ruled on the question he withdrew his objection, and the plaintiff answered in the affirmative, and then continued, without objection, by saying that, "I got the divorce on the ground of adultery with *E. S. Hammond.*" In reply, counsel refer to the fact that during the opening of the plaintiff's counsel to the jury, the court had ruled, against objection, that it was proper for him to state that the plaintiff had "applied for and obtained a divorce from his wife." Assuming that timely objection and exception was taken, the question recurs whether it was error to admit such testimony. Counsel cites no authority in support of his contention. The admissibility of such evidence seems to be unquestioned, and is generally assumed. Thus it is held that "an action of this kind may be maintained by the husband after a decree of divorce procured by the wife upon a cause of action accruing before the divorce was procured." *Wood v. Mathews,* 47 Iowa, 409. To the same effect: *Michael v. Dunkle,* 84 Ind. 544; *Wales v. Miner,* 89 Ind. 118; *Johnson v. Allen,* 100 N. C. 131, 5 S. E. 666; *Prettyman v. Williamson,* 1 Pennewill,

224, 39 Atl. 731; *Beach v. Brown,* 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114.

In one of the cases cited the criminal intercourse with the wife was accomplished after her separation from her husband. In another it was held that the complaint for criminal conversation need not allege the means by which the seduction of the wife was effected, nor that she was still the plaintiff's wife, nor that the defendant knew her to be such. In some of the cases it is held that the divorce might be considered in mitigation of damages. In some cases it is held that after a divorce the wife is a competent witness for the husband to prove the charge of adultery. *Ratcliff v. Wales,* 1 Hill, 63; *Wottrich v. Freeman,* 71 N. Y. 601; *Dickerman v. Graves,* 6 Cush. 308. This is in harmony with the ruling of this court. *Bigelow v. Sickles,* 75 Wis. 427, 44 N. W. 761; *Brown v. Johnson,* 101 Wis. 663, 77 N. W. 900. But that where there is no divorce she is incompetent as a witness to prove the criminal intercourse. *Carpenter v. White,* 46 Barb. 291. Under these authorities the wife would have been a competent witness had she been living. We must hold that such evidence is admissible, and that the remark of counsel that he would prove the fact was permissible.

2. The plaintiff proved by his wife's older sister, without objection, that his wife was twenty-seven years of age when she died. No motion was made to strike out such evidence. Error is assigned because the court then allowed the plaintiff to prove, against objection, that she died March 24, 1900, at Daytona, Florida, and that her body was brought to Eau Claire and buried. There seem to be very few adjudications directly upon the question. Counsel for the defendant cites no authority in support of his contention. Counsel for the plaintiff cite one case in which it was held that:

"Where a defendant has debauched the wife of the plaintiff, the right of action of the latter is complete, and a recovery by him is not defeated by her death before action brought." *Yundt v. Hartrunft,* 41 Ill. 9.

In an English case, more directly in point, it was held, nearly seventy years ago, that:

"If in an action for adultery it appear that the wife has died since the commencement of the action, the jury should give damages for the loss of the society of the wife from the time of the discovery of the adultery to the time of the wife's death, and also for the shock to the feelings of the husband; and this is so though it appear that there was no suspicion of the wife's infidelity till she was on her deathbed, and though the husband continued to treat her kindly up to the time of her death." *Wilton v. Webster,* 7 Car. & P. 198, 32 E. C. L. 491.

In that case the wife was in the last stage of consumption. On December 4, 1833, she "made a declaration of her guilt to her husband, which was afterwards confirmed by a declaration of the defendant himself," who had been her attending physician. She died twenty days after her confession. It was conceded in that case that the plaintiff was entitled to a verdict, and that the only question was as to the amount of the damages. Such proof of death naturally tended to limit and cut down the damages sustained. We do not find that this English case has ever been criticised or questioned. The admission of such evidence in the case at bar simply went to the question of damages. It might tend to diminish the damages, but not to increase them. Certainly, the admission of such testimony could not prejudice the defendant. Besides, as the wife would have been a competent witness had she been living, it was permissible, as held by some courts, to account for her absence as a witness by showing that she was dead. *People v. Hovey,* 92 N. Y. 554, 559; *Carpenter v. Pennsylvania R. Co.* (Sup.) 43 N. Y. Supp. 203; *Hall v. Austin,* 73 Minn. 134, 75 N. W. 1121.

3. Error is assigned because there was an offer to prove by the plaintiff that after the divorce his wife, Mrs. Lee, came to her death by suicide. Objection being made, and after

being interrogated by the court, the plaintiff's counsel said: "There is probably nothing that I could prove by this witness that I could not prove by other witnesses. We could prove only by this witness the fact that he saw the body and marks on the body. *Court:* The objection to the offer is sustained, and the jury will disregard the statements of counsel as to what he offered to prove." We perceive no prejudicial error in such ruling. The same is true in respect to the exclusion of two letters identified as having been written to the plaintiff by his wife.

4. There are twenty-three exceptions to the charge. One of them is to the charge as a whole, for the reason that it assumes the existence of facts in dispute, but without specifying any particulars. Such exception is not entitled to consideration. Several portions of the charge to which such exceptions are taken are favorable to the defendant. The brief of counsel for the plaintiff, after referring to the twenty-three exceptions in the printed case, simply states that the portion of the charge contained in eight of those exceptions mentioned "is erroneous in that it was repeatedly assumed by the court that the defendant was guilty of the wrong complained of, and it was only left to the jury to fix the damages." The portion of the charge thus referred to relates wholly to the subject of damages, and is preceded by this language: "If you find from the evidence that the defendant carnally knew and debauched plaintiff's wife without the aid or procurement of plaintiff, then you will consider and determine the amount of damages to be assessed against the defendant." The court had also previously charged the jury that, if they found that the defendant did not debauch and carnally know the plaintiff's wife, then that would end their consideration of the case, and they would return a verdict of no cause of action in favor of the defendant; and that they should not find for the plaintiff unless they were convinced from all the evidence of the defendant's guilt to a reasonable certainty. Compensatory

and punitory damages are then discussed, mostly in the abstract, and on the theory that there could be no damages unless the jury should find the defendant to be guilty; that compensatory damages must be limited to the loss which the plaintiff had "suffered, and without any regard to the defendant's ability to pay;" that punitory damages could only be assessed in case they believed that the defendant's conduct and the public good required it "as a punishment to the defendant in order to deter him and others" who might "be the like inclined from the commission of similar offenses;" and that, if they deemed it proper to assess such punitory damages, then they might "take into consideration the financial condition of the defendant." We perceive no reversible error in the charge of the court. 8 Am. & Eng. Ency. of Law (2d ed.) 266; *Matheis v. Mazet,* 164 Pa. St. 580, 30 Atl. 434.

5. Error is assigned for refusing to charge the jury as requested. The first instruction requested was to the effect that, if the jury found from the evidence that the plaintiff "knew that his wife was about to meet the defendant for the purpose of having criminal intercourse with him, and by words or acts encouraged her to do so," then they could "award him no damages on account of the commission of the act so encouraged by him." That instruction was given in the general charge. Error is assigned because the court refused to instruct the jury that: "If you find from the evidence that the defendant did have sexual intercourse with the plaintiff's wife, and also find that prior to such intercourse the plaintiff had reason to know his wife was guilty of improper conduct with the defendant, suspected her of it, and yet took no means to prevent an intercourse between them, you may consider such omission on his part in determining what, if any, damage he is entitled to recover from the defendant for seducing his wife." The law seems to be well settled that the husband cannot "be charged with connivance or consent merely because he was negligent in respect to his wife's conduct, and so per-

mitted opportunities for crime when he had no suspicion of her infidelity." "Even when he suspects her, he may, in order to obtain proof of her unchastity, leave open the opportunities which he finds, so long as he does not make new ones, or invite the wrong." 8 Am. & Eng. Ency. of Law (2d ed.) 264. "To constitute a defense to such an action the acts of plaintiff must have been such as to warrant the conclusion that he assented to the wife's infidelity." *Stumm v. Hummel,* 39 Iowa, 478. So it has been held in Massachusetts that: "A husband who does nothing to encourage his wife to commit adultery, and does not, directly or indirectly, throw opportunities therefor in her way, but who, suspecting her thereof, watches her, and suffers her to avail herself of an opportunity which she had already arranged for without any knowledge on his part, is not guilty of connivance, even if in so doing he hopes to obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason." *Wilson v. Wilson,* 154 Mass. 194, 28 N. E. 167. A quite similar ruling was made in Iowa, where it was held that: "A husband is not chargeable with collusion in allowing another to have criminal conversation with his wife from the fact that, after having his suspicions aroused, he, for the purpose of watching her, leaves open existing opportunities, where he does not create new ones or invite the wrong." *Puth v. Zimbleman,* 99 Iowa, 641, 68 N. W. 895. In that state it has been held that, to be available, the plaintiff's consent and connivance must be specially pleaded. *Morning v. Long,* 109 Iowa, 288, 80 N. W. 390. There is no evidence in the case at bar tending to prove consent or connivance on the part of the plaintiff. All he did after his suspicions were aroused by the discovery of the defendant's letters, apparently, was to vigilantly seek proof of his wife's unchastity. The refusal to give the instruction quoted was not error.

6. Error is assigned for permitting the plaintiff's counsel, in opening the case to the jury, to make improper statements,

and in refusing to rule on the defendant's objections thereto. The plaintiff and defendant had each been examined before the trial under sec. 4096, Stats. 1898. The alleged improper remarks so attributed to counsel consisted in stating that the plaintiff had obtained a divorce from his wife, and that she went to Florida and died, and that he had the body brought back for burial. Counsel for the plaintiff cites cases to the effect that the rule is less strict with regard to opening statements as to what the party proposes to prove, than as to what he claims that he has proved. *Campbell v. Kalamazoo,* 80 Mich. 655, 45 N. W. 652; *Walsh v. People,* 88 N. Y. 458. But it is unnecessary to discuss the question. What has already been said as to the admissibility of evidence on those subjects sufficiently disposes of the objections to such remarks.

7. Error is assigned for permitting the plaintiff's counsel to make improper remarks in his opening argument to the jury and refusing to rule on the defendant's objections thereto. One of such remarks complained of consisted in stating, in effect, that the defendant had, by a subpœna, called for the production of "all letters or copies of letters or writings purporting to have been written or by" the plaintiff "claimed to have been written by *E. S. Hammond* to Jennie S. Lee," and then, after the production of the three letters mentioned in the statement of facts, the defendant testified that he supposed there were some such letters, after having denied that he wrote the three letters to the plaintiff's wife so mentioned in the statement of facts; and from such admission it was argued that the defendant knew all the time that he had written the letters. The remarks, as well as the defendant's testimony, upon which the same were largely based, are too voluminous to be given here; but we think they were in the line of legitimate argument, and the exception to them must be overruled.

8. Error is assigned because in the closing argument on the part of the plaintiff it was stated that Mrs. G., whose dep-

osition was in evidence, was the keeper of a house of assignation. On being told by the court that there was nothing of that kind in evidence, counsel remarked that in the opening statement of defendant's counsel he told the jury that he would prove that Mrs. G. was the keeper of a house of assignation. Counsel for the plaintiff then made this statement:

"Now, gentlemen of the jury, I don't wish to put any false construction upon the evidence. I believed that when he made this statement that she was in a house of assignation, and when he produced the deposition to prove that she was in that house I believed it was the house of assignation he referred to."

The court then further corrected him by saying, in effect, that the statement of defendant's counsel was that on the night of September 29, 1899, the plaintiff's wife was in a house of assignation, and that the testimony was that she was in Mrs. G.'s house in 1893. The trial was manifestly exciting, and the feeling intense. There was apparently an honest misunderstanding of the statements made and the evidence. But we fail to find in the circumstance any reversible error.

9. Exception is taken because in the closing argument on the part of the plaintiff counsel said, "*Hammond* is a seducer and murderer." The defendant objected "to the statement of counsel that the defendant is a murderer." The court observed: "The objection is sustained. There is no evidence upon which any such statement can be based." The defendant then requested the court to further rule that such remark "was a breach of propriety on the part of counsel," whereupon the trial judge observed, "The court has already ruled." The evidence was undisputed that Mrs. Lee died in Florida while the defendant was in Eau Claire. There was some claim from the appearance of her body, when it reached Eau Claire, that she died by her own hand; but there was no pretense that the defendant killed her. Under the circumstances the most counsel could reasonably have meant

was that the defendant had destroyed her home, her reputation, and her happiness, which finally resulted in her death. It was a sort of response to the argument of defendant's counsel, who "stated to the jury that the plaintiff, *Lee,* had sent Mrs. Lee to her grave; that *Lee* wanted to get rid of Mrs. Lee, that he might feed on new pastures;" and "stated several times that *Lee* was a blackmailer, that he was a cuckold, that he was a procurer, that he was making merchandise of his wife's dishonor." The question has caused more hesitation than any other in the case, for fear that the remark may have increased the amount of punitory damages. But in the view of all the circumstances in the case we have reached the conclusion that the jury could not have been misled or prejudiced by the remark, and that the damages are not excessive. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

DODGE, J. I find myself unable to concur in a judgment of affirmance, because I cannot persuade myself to palliate, excuse, or believe unprejudicial the conduct of the plaintiff's attorneys in first impressing upon the jury by questions the fact that plaintiff's wife had, after the divorce between them, committed suicide, and then in vehemently asserting to the jury in closing argument that defendant was a murderer. It seems to me that nothing could have been more likely to inflame the prejudices, and at least improperly rouse indignation and enhance damages, than such conduct as this. The court correctly ruled that after the divorce between plaintiff and his wife her life or death was not a material consideration, and yet to the nonlegal minds of the jury it could not but have been cogent at least to awaken indignation, and, as I think, effective in bringing about this very large verdict

THE STATE EX REL. CITY OF NEW RICHMOND VS. DAVIDSON, State Treasurer.

114 563
116 [2]567
61 LRA 348

December 17, 1901—January 7, 1902.
March 14—June 19, 1902.

(1) *Supreme court: Original jurisdiction: Recovery of money from state treasury.* (2, 3) *Constitutional law: Taxation: Appropriations: Public purposes: Releasing indebtedness to state.*

1. In view of the legislative policy declared in sec. 3200, Stats. 1898, that suits against the state for money recovery shall be brought only in the supreme court, it is *held* that a question of general and public interest, warranting the exercise of the original jurisdiction of that court, is always involved in a suit whose ultimate practical purpose is the recovery of public moneys from the state treasury, although that result may be sought through coercion of the individual action of state officers.
2. The taxing power of the state can be exercised only for public purposes; and the determination of the legislature upon the subject is not absolutely conclusive upon the courts.
3. A cyclone destroyed a large part of the city of New Richmond in June, 1899, killing and injuring many of its inhabitants. To bury the dead, care for the injured, clear up the débris to prevent disease and pestilence, and to relieve and aid the homeless, destitute, and impoverished, the city incurred large expense. Afterwards it borrowed from the state, out of the trust funds, the sum of $21,400. At the next session of the legislature, ch. 286, Laws of 1901, was enacted, making an appropriation from the general fund to the trust funds, for the purpose of relieving the city of its indebtedness. *Held*, that the appropriation was not for an object purely local to the city of New Richmond, but was for a public purpose, subserving the common interest and well-being of the people of the state at large, and that the act was therefore valid.

   DODGE, J., is of the opinion that the act in question might be sustained under the power vested in the legislature (recognized by sec. 8, art. VIII, Const.) to release or discharge a claim or demand of the state; that the constitutional limitations upon the power of taxation do not, by necessity, extend to or control the legislature in appropriations; and that appropriations may be made to defray the expense of governmental acts, even though they are to be done in a part of the state and not in the whole.

MANDAMUS to the state treasurer. *Motion to quash alternative writ overruled.*

On December 17, 1901, the city of *New Richmond* applied for an original alternative writ of *mandamus* to command the respondent, as state treasurer, to act in obedience to ch. 286, Laws of 1901. The material parts of the petition are to the effect that the relator, by reason of distress to its citizens as the result of a violent cyclone, borrowed from the trust funds of the state, in 1899, $21,400, for which it is indebted; that by the act of legislature aforesaid, there was appropriated $21,400 out of any moneys in the state treasury for the relief of the city of *New Richmond;* and the state treasurer was commanded to transfer to the trust fund account the amount appropriated by that act, whereupon a corresponding amount of such indebtedness was commanded to be canceled. The treasurer refused to make such transfer, on the ground of alleged unconstitutionality of the act.

For the relator there was a brief by *W. F. McNally* and *L. K. Luse,* and oral argument by *Mr. Luse.*

The following opinion was filed January 7, 1902:

DODGE, J. The merits of the controversy have not been at all considered upon the application for this alternative writ, merely the propriety of this court assuming original jurisdiction to issue it. The policy and practice of this court on the subject of the exercise of its original jurisdiction have been so recently re-enunciated in *In re Court of Honor,* 109 Wis. 625, 85 N. W. 497, that reference to that case will suffice to define that policy in the main, and to indicate that several prior aberrations from the rule must not be considered as changing it. That jurisdiction will generally be made to depend upon the question, "Does the wrong to be redressed affect the sovereignty of the state, its franchises or prerogatives, or the liberties of its people?" In that case it was held that an application by a corporation to compel a state

officer to issue to it a franchise, although it involved the granting of a right by the state and construction of general laws, did not fall within the rule, for the reason that "the wrong to be redressed" was that of an individual, and the effect upon the public generally was secondary only. In another late case, where the subject was carefully considered, to wit, *In re Town of Holland,* 107 Wis. 178, 83 N. W. 319, it was decided that the wrong sought to be redressed did not become public and general so as to justify this court in exercising its original jurisdiction, simply because the party seeking vindication was one of its minor municipal or political subdivisions, in that case a town.

Those cases, taken together, would seem to rule the proposition that the present application, if measured only by the injury threatened to the relator, was not public or general in the sense of the rule prescribed to itself by this court, but was a wrong suffered merely by the city in its corporate, as distinct from its political, capacity, and, if the effect upon the state at large from the granting of the relief sought would be only the same as that presented in the *Court of Honor Case,* there could be little doubt that we should deny the writ. A distinction, however, presents itself. In that case there was sought to secure from the state of Wisconsin, acting by one of its constituted officers, merely a license to do business,—a right which the state had granted upon certain facts existing or being found, and which it was the duty of the officer in question to recognize and satisfy if the facts existed. Here the practical result of granting the relief prayed, namely, commanding the state treasurer to act, is to enable the relator to recover money from the state. Of course, in so doing, to a certain extent the whole state is affected, although such effect is perhaps not radically different in its nature from the acquisition from the state of any other right which it may give. But the recovery of money from the state has been, both by the constitution and the legislature, placed in a class

by itself. Sec. 27, art. IV, of the constitution, evidently subjects the state to a suit for money recovery, but only in such manner as the legislature by statute shall provide. *Chicago, M. & St. P. R. Co. v. State,* 53 Wis. 509, 10 N. W. 560. The legislature, by sec. 3200, Stats. 1898, has authorized such suit to be brought only in the supreme court. Now, while such legislation perhaps in terms does not, and perhaps could not, either increase or restrain this court in the exercise of its original jurisdiction by writ of *mandamus* to compel actions of individual state officers, yet it declares a legislative policy in a field delegated by the constitution, and, whether controlling or not, is entitled to deference and to our utmost co-operation to give it effect. Such policy obviously is that the liability of the state to a money claim shall be tried only by the supreme court; that the commonwealth should not be subjected to the necessity of defending in local courts, nor to the burden of appeal from decision adverse to it. In deference to that policy, we deem it seemly and proper for this court to hold that a question of general and public interest is always involved in suits, the ultimate practical purpose of which is the recovery of public moneys from the state treasury, although that result may be sought by the machinery of coercing the individual action of state officers by one of our original writs. On that ground we have decided to allow the alternative writ of *mandamus* upon the present petition.

By the Court.—Let such writ issue as prayed.

The subsequent proceedings, as well as the substance of the petition for the writ, are thus stated by CASSODAY, C. J.:

The relator filed in this court a petition for an alternative writ of *mandamus* to compel the defendant, as state treasurer, to transfer from the moneys in the state treasury, not otherwise appropriated, the sum of $21,500 to the trust funds out of which the moneys were borrowed by the city, in order

that the commissioners of such funds may cancel the indebtedness of the relator to the state. The petition alleges, in effect, the incorporation of the relator as a city in 1885; the authority given by the common council of the city for the commencement of these proceedings, and the filing of the petition; that prior to June 12, 1899, the city had a population of 1,900 persons; that its business portion consisted of a large number of stores, shops, factories, hotels, and other places of business, besides a city hall, waterworks tower and tank, pumping station, numerous churches, and more than 200 homes; that its people were well to do, prosperous, and enjoying good health and other blessings usually attendant upon a prosperous city located and surrounded by an unusually fine farming community; that on the evening of June 12, 1899, a terrific cyclone struck the city, destroying the entire business portion thereof, killing outright, or injuring so that death ensued from such injuries, 115 of its citizens, and injuring about 500 more of its citizens, many seriously, destroying upwards of 100 dwelling houses and rendering about 600 of its citizens homeless, destroying its city hall, waterworks tower and tank and pumping station, its electric light plant, and the expensive bridge crossing the Willow river within the city, and four of its churches, killing 175 large animals and a large number of smaller ones, filling the public streets and alleys, and almost the entire area of the city, with debris, destroying property of more than three quarters of a million of dollars in value, leaving the city almost a complete wreck, and its inhabitants in sore and great distress; that it became and was absolutely necessary for the city to take immediate steps for the burial of its dead, the caring for its injured, clearing up of the debris to prevent disease and pestilence, at a large expense to the city, as well as placing upon all or nearly all of its citizens the great burden and almost insurmountable difficulties of caring for the dead and injured and homeless; that many of the citizens thereof lost all of their property,—their

homes, household effects, wearing apparel,—and were rendered entirely destitute; that others were so impoverished as to be unable to rebuild their homes, and it became and was absolutely necessary for the city to care for, render assistance to, and incur large expense in so doing; that by reason of the temporary care and aid furnished by the city to many of its citizens thus destitute and impoverished, and the expenditure of large sums of money in clearing away the debris mentioned, contagious disease and pestilence were avoided, and its injured and homeless citizens, after much suffering, were enabled partially to overcome their destitute and impoverished condition, and, together with charitable assistance and aid given by public-spirited citizens of the state and elsewhere, many of its citizens have been able to get a new start, and rebuild their homes so destroyed, thus adding to the taxable property of the state not less than half a million of dollars, from which the state will in the future receive a revenue by way of taxation; that in December, 1899, the city borrowed from the state, out of the trust funds thereof, $21,400, and issued and delivered to the state its negotiable bonds for the same, and thereby became and was indebted to the state in the sum mentioned; that the legislature of the state, at its first session after the occurrence of the cyclone, enacted ch. 286, Laws of 1901, entitled "An act to relieve the city of *New Richmond,* Wisconsin, from its indebtedness to the trust funds, and making an appropriation therefor."

That act was approved by the governor and published May 7, 1901, and the first section of the act provides that: "There is hereby appropriated out of any moneys in the state treasury not otherwise appropriated the sum of twenty-one thousand five hundred dollars for the purpose of relieving the city of *New Richmond* of its indebtedness to the state trust funds incurred after the tornado of June 12, 1899, which destroyed a large part of said city." The second section of the act provides for the transfer of the amount so appropriated to the

trust-funds account by the state treasurer, and that the trust-fund commissioners should thereupon cancel a like amount of the indebtedness of the city of *New Richmond.*

The petition further alleges that at all times since such enactment there has been ample money in the state treasury, not otherwise appropriated, to satisfy the appropriation made by the act, and which might lawfully be transferred to the trust funds as therein provided; that the defendant was and is state treasurer; that it was his duty to make the transfer required by the act; that he has neglected and refused, and still refuses, to so transfer said funds, though often requested by the city to do so, upon the sole ground that the act in question is unconstitutional and void.

Upon such petition, and after hearing counsel, an alternative writ of *mandamus* was issued by this court requiring the defendant to make such transfer, or show cause to the contrary. Upon the return day of the writ the defendant appeared by the attorney general of the state, *E. R. Hicks,* and by way of return to such writ moved to quash the same "for the reason that the facts stated therein are not sufficient to constitute a cause of action."

The Attorney General for the defendant. It is a significant fact that the petition nowhere states that the indebtedness of the city to the state trust funds was incurred *by reason* of the cyclone; but it is a fair presumption that the pleader intended to base the right of the city to the appropriation upon the fact that it had suffered such serious loss. In that view, the act of 1901 is in violation of sec. 3, art. VIII, Const., which provides that the credit of the state shall never be given or loaned in aid of any individual, association, or corporation; in violation of sec. 10, art. VIII, which declares that the state shall never contract any debt for works of internal improvement or be a party in carrying on such works; and in violation of sec. 13, art. I, which declares that the property of no person shall be taken for public use with-

out just compensation therefor. The law plainly, though indirectly, makes an appropriation from the general treasury of the state to a municipality. To sustain it, the state must have authority to levy a direct tax upon the people for such a purpose, place the moneys so collected in the general fund, and then appropriate such moneys from the general fund to the municipality. No such authority exists. Cooley, Const. Lim. *487, *488, *494 (6th ed. 598, 599, 606); Hare, Am. Const. Law, 279, 280, 284; Cooley, Const. Law, 56; Sedgwick, Stat. & Const. Law, *313, *314; *Att'y Gen. v. Eau Claire,* 37 Wis. 438; *Wis. Keeley Inst. Co. v. Milwaukee Co.* 95 Wis. 153–161; *Lowell v. Boston,* 111 Mass. 454; *Coster v. Tidewater Co.* 18 N. J. Eq. 54; *Tyler v. Beacher,* 44 Vt. 648; *State ex rel. Griffiths v. Osawkee Tp.* 14 Kan. 418; *Allen v. Jay,* 60 Me. 124. Money raised by taxation cannot be given away. *Hooper v. Emery,* 14 Me. 375; *Bristol v. Johnson,* 34 Mich. 123; *Citizens' S. & L. Asso. v. Topeka,* 20 Wall. 655–664; *William Deering & Co. v. Peterson,* 75 Minn. 118. If the state can appropriate for a private purpose the money in its treasury and then replace it by taxation, it can do indirectly what it cannot do directly. *Spencer v. School Dist.* 15 Kan. 259–262. Again, the taking of the private property of one person, under the form of taxation, and granting it to another, deprives the former of his property without due process of law. *Anderson v. Hill,* 54 Mich. 477, 20 N. W. 549; 6 Am. & Eng. Ency. of Law, 47.

For the relator there was a brief by *W. F. McNally* and *L. K. Luse,* attorneys, and *Sanborn, Luse, Powell & De Forest,* of counsel, and the cause was argued orally by *Mr. McNally* and *Mr. Luse.* They argued, among other things, that the legislature, being entitled to exercise all legislative power not expressly forbidden by the constitution, may exercise all the powers of Parliament, and appropriate public money for either a public or private purpose. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 60; *Council Bluffs & St. J. R. Co.*

v. Otoe Co. 16 Wall. 675; Cooley, Const. Lim. (6th ed.) 104, 288. It is conceded that the power of taxation can only be exercised for a public purpose; but the courts have been very careful, in so holding, not to infringe upon the right of the state or the power of its legislature to make a donation of funds acquired otherwise than by taxation. *Citizens' S. & L. Asso. v. Topeka,* 20 Wall. 655, 659; *Roberts v. N. P. R. Co.* 158 U. S. 1; *Lowell v. Boston,* 111 Mass. 454; *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *Cole v. La Grange,* 113 U. S. 1; *Sutherland v. Evart,* 86 Fed. 597. Clearly analogous to the distinction above made is that drawn by this court between the proprietary interest of the state in property held by it and that to which it holds title in trust for the public. *McLennon v. Prentice,* 85 Wis. 444; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534; *Ill. Cent. R. Co. v. Illinois,* 146 U. S. 387. This court will take judicial notice that the state receives a large revenue from other sources than taxation, as for instance, license fees paid by foreign corporations, for peddler licenses, hunting licenses, and even the large amount received from railroad companies may be regarded as a license fee rather than a tax. *Fire Dept. v. Helfenstein,* 16 Wis. 136; *People v. Fire Asso.* 92 N. Y. 327; *Burlington v. Bumgardner,* 42 Iowa, 673; Cooley, Taxation, 586. As to whether the legislature of a state may donate public money for a private purpose, see *Daggett v. Colgan* (Cal.) 14 L. R. A. 474; *State v. Nelson Co.* 1 N. Dak. 88–98; Tiedeman, Lim. Police Powers, 476. The relation does not state for what purpose the money was borrowed, but the court will presume that it was for a lawful purpose, and manifestly the city could not borrow money and give a valid obligation to the state for anything but a public purpose; and if the debt was incurred for a public purpose it would seem to follow that the discharge of the municipality therefrom would be for a public purpose. As to what constitutes a public purpose, see *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *Wis. W. Co. v. Winans,* 85 Wis. 26;

Gleason v. Waukesha Co. 103 Wis. 225; *Wis. Ind. School v. Clark Co.* 103 Wis. 651; *Trustees v. Roome,* 93 N. Y. 313; *Weismer v. Douglas,* 64 N. Y. 100; *Hill v. Easthampton,* 140 Mass. 381; *Hubbard v. Taunton,* 140 Mass. 467; *State ex rel. Douglas Co. v. Cornell,* 54 Neb. 72, 74 N. W. 59; *Daggett v. Colgan* (Cal.) 14 L. R. A. 474. Certainly the exercise of the police powers for public health, common good, or general welfare of the people is a public purpose within all of the authorities. *Slaughter-House Cases,* 16 Wall. 36; *Fertilizing Co. v. Hyde Park,* 97 U. S. 659; *Hayes v. Oshkosh,* 33 Wis. 314; *Schmidt v. Stearns Co.* 34 Minn. 112; *Wilkinson v. Long Rapids,* 74 Mich. 637, 41 N. W. 861; *Thomas v. Mason,* 26 L. R. A. 727; *State ex rel. Goodwin v. Nelson Co.* 8 L. R. A. 283; *Donnelly v. Decker,* 58 Wis. 461; *Comm. v. Alger,* 7 Cush. 53; *Thorpe v. R. & B. R. Co.* 27 Vt. 140. To hold a tax invalid because not for a public purpose it must appear that there was no possible public interest to be subserved by it. *Brodhead v. Milwaukee,* 19 Wis. 624; *Mills v. Charleton,* 29 Wis. 411; *Lund v. Chippewa Co.* 93 Wis. 640; *State ex rel. McCurdy v. Tappan,* 29 Wis. 664. Even where the money expended is raised by taxation it is not necessary that the entire state should be interested in the object of the tax. *Kingman Case,* 153 Mass. 566; *Talbot v. Hudson,* 16 Gray, 417; *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485; *Jenson v. Polk Co.* 47 Wis. 298, 313; *Rock Co. v. Edgerton,* 90 Wis. 288; *People ex rel. Einsfeld v. Murray,* 149 N. Y. 367, 44 N. E. 146. The purpose of this appropriation being public, it was for the legislature to determine whether the conditions were such as to warrant the exercise of its powers to relieve the city from some of its burdens. The court will not review the discretion of the legislature in exercising such powers. *Waterloo W. Mfg. Co. v. Shanahan,* 128 N. Y. 345, 28 N. E. 358; *Hovey v. Foster,* 118 Ind. 502, 21 N. E. 39; *Soon Hing v. Crowley,* 113 U. S. 703; *Stevenson v. Colgan,* 91 Cal. 649, 27 Pac. 1089.

CASSODAY, C. J. The importance of the question involved is fully appreciated, and the case has received the very careful consideration of every member of the court. No one doubts "that the state legislature has authority to exercise any and all legislative powers not delegated to the federal government, nor expressly or by necessary implication prohibited by the national or state constitution." *Bittenhaus v. Johnston*, 92 Wis. 595, 66 N. W. 805, and cases there cited, and *Wisconsin Keeley Inst. Co. v. Milwaukee Co.* 95 Wis. 156, 70 N. W. 68. "So it is undoubtedly true, as claimed, that a statute should, if possible, be so construed as not to be in conflict with the constitution." *Id.* The constitution provides that "no money shall be paid out of the treasury except in pursuance of an appropriation by law." Sec. 2, art. VIII, Const. Wis. But this does not mean that the power to appropriate money out of the state treasury is unlimited. It can only be so appropriated "by law," and that means a valid law. No construction is permissible which defeats the obvious purpose and object of constitutional restrictions. *Wisconsin Keeley Inst. Co. v. Milwaukee Co., supra.* "The power of the government," says Mr. Tiedeman, "to embark in enterprises of public charity and benefit can only be limited by the restrictions upon the power of taxation, and to that extent alone can these subjects in American law be said to fall within the police power of the state." Tiedeman, Lim. 4; *Wisconsin Keeley Inst. Co. v. Milwaukee Co.* 95 Wis. 157, 70 N. W. 68. "It is implied in all definitions of taxation," says Mr. Cooley, "that taxes can be levied for public purposes only." Cooley, Taxation (2d ed.) 103–105. "It may be regarded as a settled doctrine of American law," says Mr. Dillon, "that no tax can be authorized by the legislature for any purpose which is essentially private, or, to state the proposition in other words, for any but a public purpose." 1 Dillon, Mun. Corp. (4th ed.) § 508. See, also, Hare, Am. Const. Law, 279.

This court, as well as many others, has frequently declared

that the taxing power of the state can only be exercised for some object of public or common interest. *Soens v. Racine,* 10 Wis. 271, 279, 280; *Brodhead v. Milwaukee,* 19 Wis. 624; *Curtis's Adm'r v. Whipple,* 24 Wis. 350; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167; *State ex rel. McCurdy v. Tappan,* 29 Wis. 664, 687; *Att'y Gen. v. Eau Claire,* 37 Wis. 400, 436, 437; *Wisconsin Keeley Inst. Co. v. Milwaukee Co.* 95 Wis. 153, 70 N. W. 68; *Loan Asso. v. Topeka,* 20 Wall. 655, 663; *Allen v. Jay,* 60 Me. 124; *William Deering & Co. v. Peterson,* 75 Minn. 118, 77 N. W. 568. These adjudications, and many others which might be cited, seem to be based upon the broad ground that from the very nature of our state government there is running through our constitution an implied prohibition against forcing our citizens, by way of taxation, to contribute to any mere private purpose or enterprise, and that the determination of the legislature upon the subject is not absolutely conclusive upon the courts. Cooley, Taxation (2d ed.) 103–105. That learned author there quotes approvingly the language of the supreme court of the United States in the case above cited, where it is, among other things, said:

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. . . . To lay with one hand the power of the government on the property of the citizen, and with the other bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called 'taxation.' This is not legislation. It is a decree under legislative forms."

So Mr. Dillon declares that:

"We may readily conceive of acts of the legislature demanding sacrifices which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the constitution should be infringed." 2 Dillon, Mun. Corp. (4th ed.) § 737.

But it is not seriously claimed that the object of the legislation in question was not public.

2. The question recurs whether every public object or enterprise may be promoted by taxation? Can the citizens of this state be compelled, by way of taxation, to contribute to any public purpose in Maine or California, or any foreign country? Can the citizens of Dane county be thus compelled to contribute to any public purpose confined to the county of Marinette or St. Croix? Can the citizens of the state be thus compelled to contribute to an object which is purely local, but nevertheless public? The learned author last cited says:

"There can be no legitimate taxation to raise money unless it be destined for the uses or benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of a tax. Theoretically, the taxpayer is compensated for the taxes he pays in the protection afforded to him and his property by the government which imposes the tax; but the substantial foundation of the power is political, civil, or governmental necessity, and taxes are largely, if not wholly, as Mr. Mill insists, sacrifices for the public good, 'equality of sacrifice' being the rule dictated by justice. Equality, indeed, so far as practicable, is inherent in the very idea of a tax, as distinguished from arbitrary exaction." 2 Dillon, Mun. Corp. (4th ed.) § 736.

So Mr. Cooley declares that:

"Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and, as all are alike protected, so all alike should bear the burden in proportion to the interests secured." Cooley, Const. Lim. (6th ed.) 608.

To the same effect, *Booth v. Woodbury,* 32 Conn. 118. In one of the cases cited DIXON, C. J., said: The legislature "cannot, in the form of a tax, take the money of the citizens, and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of *the community required to contribute.*" *Brodhead v. Milwaukee,* 19 Wis. 652: This is quoted approvingly in Cooley, Const. Lim. (6th ed.) 601, 602. Thus, in an early Pennsylvania case it is held that:

"By taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. The right of a state to lay taxes has no greater extent than this." *Sharpless v. Philadelphia,* 21 Pa. St. 148.

In a later case in that state it is held that:

"An act authorizing the levy of contributions for a private purpose, or a purpose which, though public, is one in which the people from whom it is exacted have no interest, is not a law, but a judicial sentence, and not within legislative authority." *Grim v. Weissenberg,* 57 Pa. St. 433.

So in that state it is further held that:

"The rule is, local taxation for local purposes, or taxation on the benefits conferred, but not beyond them. The legislature, by its general powers, cannot levy, or authorize a municipality to levy, a local tax for general purposes. Taxation exacts money or services from individuals as their respective shares of contribution to any public burden." *Hammett v. Philadelphia,* 65 Pa. St. 146.

The authorities thus far cited relate to implied constitutional restrictions.

3. But we are not wanting in express limitations upon the power of taxation. In one of the cases cited Chief Justice RYAN, speaking for the court, said:

"Taxation is the absolute conversion of private property t public use. And its validity rests on the use. In legislativ grants of the power to municipal corporations the public use

must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only, and the validity of the delegation rests on the public purpose. Were this otherwise, as was said at the bar, municipal taxation might well become municipal plunder." *Att'y Gen. v. Eau Claire,* 37 Wis. 438.

Such language is in harmony with the authorities cited to the effect that the protection to the persons and property of the citizens is the compensation they receive for the tax imposed upon them. No constitutional provision is cited by the learned chief justice, but the statements made naturally suggest the constitutional provision which declares that "the property of no person shall be taken for public use without just compensation therefor." Sec. 13, art. I, Const. True, the right of condemnation is based upon a different theory than the right of taxation. *Sharpless v. Philadelphia,* 21 Pa. St. 147; *Booth v. Woodbury,* 32 Conn. 118. Nevertheless, the underlying principle is very much the same. In one of the cases cited it was, in effect, held that an act of the legislature which undertook to compel one town to levy a tax for a certain purpose, but did not impose a like obligation upon other towns, was in violation of the constitutional provision which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe" (sec. 1, art. VIII, Const.). *State ex rel. McCurdy v. Tappan,* 29 Wis. 664. In construing that section, this court has recently said:

"This provision manifestly requires such uniformity, in case of a state tax, to extend throughout the state; in case of a county tax, to extend throughout the county; in case of a city tax, to extend throughout the city; and, in case of a town tax, to extend throughout the town. In other words, the rule of uniformity is not broken merely because a town or city or county raises a special tax for local purposes." *Lund v. Chippewa Co.* 93 Wis. 647, 67 N. W. 930.

If the object of the appropriation in question was purely local to the city of *New Richmond,* then the rule of uniformity would require the tax to supply the same to be limited to that municipality. If, however, the contribution was to subserve the common interest and well-being of the people of the state, then the appropriation was legitimate. The constitution also provides:

"The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year." Sec. 5, art. VIII, Const.

To that language must be applied the well-known maxim, *Expressio unius est exclusio alterius.* That construction limits such annual tax to an amount sufficient to defray such estimated expenses. *Att'y Gen. ex rel. Schantz v. Brunst,* 3 Wis. 793; *State ex rel. Crawford v. Hastings,* 10 Wis. 531; *Todd v. Lee,* 15 Wis. 376; *Price v. Wis. M. & F. Ins. Co.* 43 Wis. 292; *State ex rel. Priest v. Regents,* 54 Wis. 164, 11 N. W. 472. State taxes are thus only authorized to pay state expenses, or such expenditures as are authorized by the constitution.

4. Can we say that the appropriation in question was for a public purpose, and such as subserved the common interest and well-being of the people of the state? Had the legislature been in session June 12, 1899, when the terrible calamity struck *New Richmond,* could they, constitutionally, have made the appropriation in question to bury the dead, relieve the suffering, care for the helpless, and prevent disease and pestilence from spreading to other communities and the state at large? This court has held that:

"To justify a court in declaring a tax void, and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which the funds are raised

must be so clear and palpable as to be immediately perceptible to every mind. Claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax." *Brodhead v. Milwaukee,* 19 Wis. 624; Cooley, Taxation, 127, 128.

Had the entire able-bodied population of the city been killed, there would seem to be no doubt that it would have been the duty of the state to bury the dead, care for the suffering, and relieve the helpless. This court has held that the administration of the criminal laws is a state affair, and that the officers engaged in such duties represent the sovereign power of the state. *Northern Trust Co. v. Snyder,* 113 Wis. 516, 538, 89 N. W. 460, 466. So we are constrained to hold that the state at large was concerned in the objects of the appropriation in question, and that, if the legislature had been in session June 12, 1899, it might legitimately have appropriated the amount mentioned for the object in question. This being so, it follows that the legislature had the power to pass the act in question to reimburse the city for such expenditures. No forecast could have anticipated and guarded against the calamity. The local authorities were powerless in the presence of such great destruction, suffering, and death. The condition of things, so suddenly precipitated, the claims of humanity, and the good of the state called for immediate and extraordinary relief. In passing the act the legislature were called upon to consider the whole situation. The people of the commonwealth were bowed in sorrow over the great calamity, and the call was for the immediate exercise of the police power of the state on a large scale. The object of the act being public, and to subserve the common interest and well-being of the people of the state at large, brought the subject legitimately within the power of the legislature. Having the power, the extent of its exercise was a matter of legislative discretion. If there was any doubt as to the power, duty would require us to resolve such doubt

in favor of the validity of the act. We cannot say that the act is invalid. On the contrary, and after very careful consideration, we have reached the conclusion that the act is valid.

By the Court.—The motion to quash the writ and the demurrer to the relation are overruled

DODGE, J. With the ultimate decision in this case to the effect that there might have been a general and public purpose warranting not only expenditure, but even taxation, by the state government, and therefore that the decision of the legislature to make the particular expenditure cannot be held void by the courts, I am in most cordial concurrence. I think, also, that the act reviewed might well have been sustained under the power vested in the legislature to release or discharge a claim or demand of the state,—a power expressly recognized by sec. 8, art. VIII, of the constitution. Neither have I serious doubt of the general correctness of the views expressed in the opinion of the court upon the limits surrounding the power of taxation. In that opinion I read, however, an inference at least, if not express suggestion, that similar limits rest upon the power of the legislature to appropriate public moneys already in the treasury, and I feel called upon to note my inability to concur in such view. The question, of course, is not strictly in this case. The present appropriation being valid, the court has not before it for decision the validity of a different one, and extended discussion may well be postponed until that question arises. I now merely feel called on to record my view that the limits upon the power of taxation do not, by necessity, extend to or control the legislature in appropriations. Upon the former rest all those express constitutional provisions which protect the individual against governmental aggression, for the act of taxation directly reaches the individual and his private property. It is, says RYAN, C. J., "the absolute conversion of

private property to public use." *Att'y Gen. v. Eau Claire,* 37 Wis. 400, 438. After the conversion is complete, however, the moneys acquired have become public, and are mingled with other public moneys and property. As such they are freed from many of the restraints upon interference with individuals and their property, and are protected by other constitutional provisions designed for that purpose. They may be paid out only in pursuance of an appropriation by law (sec. 2, art. VIII); i. e., by the legislative branch of the government. Such a law can only be passed by vote of a majority of a three-fifths quorum, taken by yeas and nays. Sec. 8, art. VIII. They shall not be paid for any claim not filed in six years (sec. 2, art. VIII), nor for carrying on works of internal improvement (sec. 10, art. VIII), nor for extra compensation after services are performed (sec. 26, art. IV). By these, and perhaps other, express provisions, the constitution fixes certain limits to the power to spend public moneys. The maxim, *Expressio unius est exclusio alterius,* excludes any purpose that other limits should exist.

Again, I find certainly the intimation that, if the object of the present appropriation was purely local to *New Richmond,* it might not be valid. If by "local" is meant "municipal," it may be that the express constitutional requirement that municipalities be created under local municipal government (sec. 3, art. XI) gives support to the idea, but from the context I do not understand the word to be so used, but to refer to an object to be accomplished in a part of the state, and not in the whole. In that sense I can find nothing in the constitution which warrants the court to override the decision of the legislature as to where public money may be spent. The constitution brought into existence a state government to govern the whole state, including every part. Public peace or health is as much within the protection of that government, whether the threat against them and consequent exercise of governmental power occurs only in the woods of Ashland, or

the prairies of Kenosha county, or throughout the state at large. It is not necessary that insurrection spread over the whole state before the militia may be put in service at state expense, nor that smallpox develop in more than one locality before the state boards of health may properly intervene. It is only by legislation, not by constitutional requirement, that the felon is arrested and tried by officers paid by a county. Indeed, the state at large does pay the judge before whom the trial occurs. In brief, it seems to me that the doctrine that the state cannot defray the expense of a governmental act if it be local is destructive of the efficacy of state government.

IN RE PLANKINTON BANK: THE NATIONAL BANK OF THE REPUBLIC, Respondent, vs. HERMAN, Appellant.

April 23—June 19, 1902.

Voluntary assignment: Objections to claim, after time limited: Discretion.

1. An assignee or creditor who wishes to file objections or to attack any claim on file, after the time limited by sec. 1699, Stats. 1898, can do so only upon application to the court, upon notice to the claimant, a *prima facie* showing of merits, and some reasonable excuse of the default; in which case the court will exercise a reasonable discretion in furtherance of justice.
2. The fact that one assignee has resigned and a new one been appointed does not authorize the latter to reopen the proceedings so as to attack an admitted claim, otherwise than by permission of the court upon notice and good cause shown.

APPEAL from an order of the circuit court for Milwaukee county: FRANK M. FISH, Judge. *Affirmed.*

On June 1, 1893, the Plankinton Bank of Milwaukee made a voluntary assignment to William Plankinton, who accepted said trust and qualified as assignee. On June 2d, notice to creditors was published. August 31st, the *National*

Bank of the Republic filed its claim with the assignee, setting out that on December 31, 1892, the Buffalo Mining Company executed its five promissory notes of $10,000 each, payable to the order of F. and W. Schlesinger, due on demand, and bearing seven per cent. interest. Before maturity, said notes were indorsed and delivered to the Plankinton Bank, and by it were indorsed and duly transferred to the claimant. On June 19, 1893, said notes were presented for payment, payment refused, and each was duly protested, and notice given to the Plankinton Bank. June 27, 1893, the sum of $5,000 was paid on the notes. No further payments have been made. Also that on February 20, 1893, F. T. Day executed his promissory note, payable to W. H. Momsen, cashier, for $25,000, due on demand, with seven per cent. interest. Before maturity, said note was indorsed by the Plankinton Bank, and became the property of claimant. Sundry payments were made, and after deducting all offsets there was due thereon the sum of $3,802.80 and interest at five per cent. from June 2, 1892. August 19, 1893, said note was presented for payment, payment was refused, and protest made and notice duly given. The balance claimed on all the notes was $49,648.63.

This claim was duly filed with the clerk of the circuit court on November 23, 1893, by the assignee. The record shows that there was attached to this claim a letter from attorneys in New York, representing the claimant, dated December 23, 1893, and a statement of account between the claimant and the Plankinton Bank, showing the amount due to be $49,229.15. The letter mentioned refers to a letter from the assignee, and asks him to consider "our last communication . . . as an amendment to the proof of claim heretofore forwarded," etc. Upon the original proof of claim, in lead pencil, in the handwriting of Mr. A. E. Fletcher, agent of the assignee, appears the following: "This claim amended as per statement attached, making correct amount $49,229."

November 23, 1893, the assignee filed proof of the publication of notice, a list of creditors to whom notice had been sent, and a list of creditors from whom affidavits of claims had been received and filed as required by sec. 1699, S. & B. Ann. Stats. No objections were ever filed to this claim. From time to time thereafter the assignee paid dividends on all claims, aggregating fifty-five per cent.

On July 18, 1899, the assignee resigned, and Irving M. Bean was appointed to succeed him. December 20, 1899, Bean was removed, and *Henry Herman,* the present assignee, was appointed. In January, 1900, *Herman* filed a petition setting forth that he was advised by his counsel that said claim was invalid; that no list of claims had been filed by the former assignee, and that no order had been made in the assignment proceedings allowing or determining who were creditors; and asking to be allowed to file objections to said claim. An *ex parte* application was made to Judge JOHNSON, and on January 27, 1900, an order was made allowing objections to be filed, and providing for service of the same upon the claimant. The objections were to the effect that the claim in question was not a loan for which the notes in question were held as collateral, but a rediscount of the same, and that the same was not protested so as to bind the Plankinton Bank as indorser, and therefore the latter was not indebted to the claimant or liable on its indorsement. These objections were served on claimant. On March 21, 1900, the claimant moved to set aside and vacate said order permitting objections to be filed, on the ground that such order had been improvidently granted; that the time for filing objections had long since expired; that the said assignee was estopped by action of his predecessor from now questioning said claim; and that the petition upon which said order was granted did not state facts to justify opening the default. A hearing was had before Judge FISH, who was called in for that purpose. The

former order was vacated, and the objections filed were stricken out. The assignee appeals.

For the appellant there were briefs by *Moritz Wittig, M. M. Riley,* and *J. B. Doe,* and oral argument by *Mr. Wittig* and *Mr. Riley.*

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and the cause was argued orally by *Jackson B. Kemper.*

BARDEEN, J. Sec. 1699, S. & B. Ann. Stats., provides that, at the expiration of three months from the first publication of notice to creditors, the assignee shall file with the clerk of the circuit court proof of the publication of such notice, a list of creditors to whom such notice was mailed, and a list of creditors from whom affidavits of claims have been received. At any time within thirty days after such list is filed, the assignee or any creditor may file written objections to the whole or any part of any debt claimed by any creditor, and serve the same upon the creditor in the manner therein pointed out. The claimant herein filed its claim within the time required. Later, upon correspondence with the assignee, its claim was amended, and for six years and two months the claim stood without objection.

Shortly after the expiration of the three months after the publication of the notice to creditors, the assignee filed a list of creditors from whom affidavits of claims had been received, which included the claimant's claim among many others. The attorneys for the assignee have raised some questions as to the regularity of filing this list. They are so unimportant that we decline to discuss them. At the very latest, the time for filing objections to this claim expired thirty days after its amendment. When that time expired, it stood as an admitted claim. No action, either by the assignee or by the court, for its allowance, was required or is contemplated by

the statute. The deed of assignment requires the assignee to gather up the assets of the assignor and distribute the proceeds to the *bona fide* creditors in accordance with the provisions of the statute. The statute requires each creditor to exhibit and file his claim. It then becomes the duty of the assignee to examine and inspect such claims, and make such objections thereto as he may be advised. Any creditor may also file objections, but each must proceed within the time limited by the statute. At the expiration of that time, no objections being filed, the claim stands admitted without any action either by the court or the assignee. It stands allowed by operation of law. It cannot be thereafter attacked except by permission of the court, upon good cause shown.

No line of practice has been prescribed by the statute, or laid down by the court, in cases where it is desired to obtain relief from default or failure to file objections as required. The statute gives the court plenary power and full supervision over all proceedings in voluntary assignments. Sec. 1693. We have no doubt as to its power to supervise, revise, review, and reverse any action taken by the assignee up to the very day of his final discharge. It may, at any time before final settlement, relieve the assignee from any default; may investigate, correct, adjust, or disallow claims, or reduce or increase the same according to the rights of the parties. This power of supervision was given the court in pursuance of the policy of the law to work out equal and exact justice between the estate of the assignor and the creditors. The power to investigate a claim at any stage of the proceedings, and make any correction that equity and justice demands, results from the general grant of power of supervision. Courts of bankruptcy exercised it freely under the federal statutes. Black, Bankr. p. 179, § 57. Questions of amendment or relief from defaults are such as address themselves to the equitable consideration of the court, and great discretion should be exercised in disposing of them. The discretion to be invoked

must have a reasonable basis to rest upon. Although, as suggested, no definite rule of practice has been adopted, we see no reason why the ordinary rules in legal proceedings should not govern, so far as applicable. Such rules should be applied, in view of the policy and purpose of the assignment law, to work out justice to all concerned in the assigned estate.

In the proceeding before us, the claimant filed its claim within the time limited. By correspondence between the assignee and the claimant it was amended to show the full nature of the claim and the true amount due. It stood as an admitted claim for more than six years. In the meantime the assignee paid no less than five dividends, aggregating fifty-five per cent. of the face of the claim. When the present assignee came into power his attorneys seem to have regarded the action of the former assignee with great suspicion. When the claim of the *National Bank of the Republic* was reached, they concluded that it was invalid. Thereupon the assignee made an *ex parte* application to the court for leave to file objections. The petition set out that no order had been made determining who were creditors and entitled to participate in dividends, and "no list of claims allowed by William Plankinton, the former assignee, has been filed, . . . and that the persons who have filed claims against said estate, as creditors thereof, can only be ascertained by going through the several proofs of claim filed with the clerk." An order was made allowing objections to be filed. Thereafter, the attorneys of the claimant moved to vacate such order on various grounds, among others that such order had been improvidently made. Such motion was granted, and we think properly. In the first place, the assignee's application was *ex parte*. The bank's claim had stood admitted for more than six years. Repeated dividends had been paid upon it. The assignee and all creditors were in default. The bank had a right to depend upon this situation. If it was to be changed,

it was entitled to notice. Not one word appears in the petition to excuse the default. The fact that one assignee resigned, and a new one is appointed, does not reopen the proceedings. The successor takes the situation as he finds it. If he desires to change it, it must be upon notice and good cause shown. The presumption is that the former assignee did his duty. No fact is mentioned in the objections that was not fully apparent to the former assignee. The present assignee made no claim that he had made any investigations or had obtained any information not possessed by his predecessor. The substance of his objections was that the bank's claim was not a loan as set forth in the proof of claim filed, but was a rediscount of the notes mentioned. *Non constat,* the former assignee may have made full investigation of this fact, and reached the conclusion that this objection was baseless. Certainly, the estate should not be involved in useless litigation, or the claimant put to expense, after so long a default, without some showing that the former assignee had neglected to make investigation, or that the present assignee had become possessed of some information sufficient to warrant taking action. The assignee's petition also informed the court that no list of claims had been filed by the former assignee. The record before us shows that such a list, substantially in compliance with the statute, was filed by the assignee on November 23, 1893. It does not lie in the mouth of the present assignee to dispute or repudiate the acts of his predecessor, done in this regard, in attempting to comply with statutory requirements. Our conclusion from the record is that the list filed by Mr. Plankinton was in substantial compliance with the statute, and that the petition in that respect was untrue.

That there may be no mistake as to our conclusions, we will summarize them briefly as follows: When an assignee or any creditor desires to file objections or to attack any claim on file, after the time limited by sec. 1699, he may do so upon

application to the court, upon notice to the creditor, a *prima facie* showing of merits, and some reasonable excuse of the default; in which case the court will exercise a reasonable discretion in furtherance of justice. The order allowing the assignee to file objections was improvidently made, because without notice, without any attempt to excuse the default, and because the petition was untrue in the particular before mentioned. These facts justify the order appealed from, and render a discussion of many questions raised by the assignee's attorneys unnecessary.

By the Court.—The order is affirmed.

GUTZMAN, Respondent, vs. CLANCY, Appellant.

114 589
e116 *342
116 *343

April 23—June 19, 1902.

Assault and battery: Mutual assaults: Counterclaim: Evidence: Objections: Exceptions: Instructions to jury: Special verdict: Improper remarks of counsel.

1. In the course of a continuous encounter, one party at one time and his opponent at another may be guilty of assault, so that each may be entitled to recover damages from the other.
2. In an action for assault and battery defendant may counterclaim damages resulting from any assault committed on him by plaintiff in the course of the encounter, although he himself was the original aggressor. The word "transaction" as used in sec. 2656, Stats. 1898, is broad enough to include the entire, continuous physical encounter.
3. After defendant had introduced extracts from plaintiff's deposition taken under sec. 4096, Stats. 1898, it was not a reversible error to permit plaintiff to introduce, over a mere general objection, the whole of the deposition, where parts of it qualified and explained the extracts introduced, although other parts were inadmissible.
4. In an action for assault and battery it was not error to admit evidence as to the degree and duration of plaintiff's disablement, to show the extent of his injuries for which general damages were claimed, where the jury were instructed not to allow any damages for loss of time because not pleaded.

5. An exception to the refusal to give a requested instruction without modification is not available unless taken at the trial, the right to except after the trial being confined by sec. 2869, Stats. 1898, to the charge itself.
6. Failure to object at the time to remarks of counsel in the argument to the jury, so as to give counsel an opportunity to correct or the court to rule, will be deemed a waiver of objection.
7. Remarks of plaintiff's counsel in his closing argument, to the effect that he knew defendant to be a man to whom money was of more importance than honor, were improper as an attempt to state facts as of counsel's own knowledge and not by way of inference from the evidence, and, in the absence of a proper ruling in response to defendant's objection, constituted prejudicial error.
8. Exceptions to instructions upon the ground that they are contrary to law and the evidence do not raise the question of the propriety of giving them to the jury generally, without indicating their applicability to the questions of the special verdict.
9. The characterizing of instructions as being given at the request of one party or the other, or the failure to so characterize them, is not ordinarily reversible error. In the case of a special verdict the better practice is to make no distinction between that which originates with the court and that which originates with either counsel.
10. A charge which informs the jury of the effect upon the rights of the parties of the answers to questions in a special verdict, is erroneous.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

Plaintiff was janitor of a certain building in Oshkosh, and defendant was one of a firm renting one of the stores contained therein. Some controversy arising as to the proper place for doing work in repair of sewers, and words and epithets passing between the parties, a personal encounter took place. Each charged the other with being the aggressor, and the defendant especially charged that the plaintiff, even if not guilty of the first assault, was guilty of using more force than was necessary in repelling the assault, thereby causing the defendant injury, for which he counterclaimed.

As a result of the trial, the jury found a special verdict as follows: (1) Defendant committed the first assault; (2) party first assaulted did not use more force than was reasonably necessary in repelling the assault; (3) assess plaintiff's damages at $350; (4) if the defendant has judgment, he is not entitled to any damages on his counterclaim. Motion for a new trial was overruled, and judgment for plaintiff for the amount of damages specified in the verdict was entered, from which the defendant appeals.

For the appellant there was a brief by *Thompson, Harshaw & Thompson,* and oral argument by *A. E. Thompson.*

For the respondent there was a brief by *Barbers & Beglinger,* and oral argument by *Charles Barber.*

DODGE, J. This is a plain case of a debate commencing in words and terminating *vi et armis;* the one phase presenting about as much of appeal to pure reason as the other. If each party had been satisfied to merely enforce his arguments by words upon the ear of the other, he might have claimed victory without peril of appeal and reversal; but, when he sought to impress his logic upon the nose and eyes of his opponent, he brought the discussion within the arbitrament of the courts. And after all, the really important question—where the sewer leaked—will not be settled nearly so conclusively as it might have been by a few minutes' diligent use of a spade. But however unworthy of intelligent beings the whole proceeding may have been, the courts, being invoked, must treat the question presented with the gravity due to more worthy subjects of litigation. The assignments of error are numerous; the subjects of debate much more so; but many of them are either so immaterial to the result, or so without proper objection and exception, as not to justify examination or decision. We proceed to consider the more important.

Error is assigned upon a ruling that the jury could not,

under any finding of the facts, make an award of damages to both parties, although the one first assaulted might, by excessive force, have become guilty of an assault on the other. This ruling is claimed to contravene the doctrine of *Shay v. Thompson,* 59 Wis. 540, 18 N. W. 473, and *Pelton v. Powell,* 96 Wis. 473, 71 N. W. 887. If so, however, that of itself could not require reversal, for the jury have negatived the existence of facts to warrant any award to defendant by finding not only that he commenced the affray, but also that plaintiff did not use any unnecessary or excessive force. Although the question may not affect the result of this appeal, it will, however, still be an important one in case the parties persist further in this litigation, and the duty to decide it seems to be imposed on us.

That, in the course of the same fracas, one party at one time and his opponent at another may be guilty of assault, so that each may be entitled to recover damages, seems to be entirely settled by the authorities. *Dole v. Erskine,* 35 N. H. 503; *Darling v. Williams,* 35 Ohio St. 58; *Barholt v. Wright,* 45 Ohio St. 177, 181, 12 N. E. 185; *Shay v. Thompson, supra;* Cooley, Torts (2d ed.) 190. The original aggressor continues such so long as the other restrains himself within the bounds of defense, but, when the latter exceeds those bounds by using more than necessary force, he thereupon becomes aggressor, and liable for such damages as he thereby inflicts. As the principle is stated in *Dole v. Erskine, supra,* and most of the other cases, there are, in effect, two assaults, one succeeding the other, separated, indeed, by only a moment of time, but as effectively in law as if a day had intervened, so that they are different transactions. This sounds well on paper, and is perhaps too well supported by authority to be now repudiated; but we confess serious difficulty in applying it to the ordinary physical encounter, where victory may be continually shifting her perch from one combatant to the other, and where each, as he gains the advantage, change

from defender to aggressor. It is likely to be extremely difficult for juries to ascertain whether a blackened eye or flattened nose occurred at a moment of illegal attack or lawful defense. However, as the law seems well settled, those difficulties we may leave for solution by the trial courts and their juries.

There being a possibility of two rights of recovery resulting from one continuous encounter, the next question arising is whether they may be subject of counterclaim in the same action, so that the jury may make allowance to each, and, setting off one against the other, give ultimate recovery for only the balance to him most injured by wrongful acts of the other. Counsel does not cite any authority for a favorable answer to this question, unless, as he contends, *Pelton v. Powell,* 96 Wis. 473, 71 N. W. 887, is such. That case does not decide the exact question. There the plaintiff claimed that, in the entire affray, defendant was the aggressor, while defendant claimed that all his acts were defensive, and that the same acts set forth in the complaint constituted an assault on him by plaintiff, for which he counterclaimed damages. The court held that the transaction set up by the counterclaim was identical with that in the complaint, and therefore the defendant might plead those acts as a counterclaim arising out of the same transaction. It was pointed out that the facts of the counterclaim served to defeat plaintiff's cause of action. The result was that the parties might try the question who committed the one assault, and judgment be rendered against him in favor of the other. There was no contemplation of a severance of the fracas, so that during one period defendant might be aggressor and liable, and during another the situation be reversed. That case is entirely analogous to two in New York, where collision of vehicles was claimed by the owner of each to have been caused solely by negligence in the other; each denying any negligence on his own part. Counter-

claim by the one first sued was sustained. *Ryan v. Lewis,* 3 Hun, 429; *Heigle v. Willis,* 50 Hun, 588, 3 N. Y. Supp. 497. The exact question here presented has, however, been decided in favor of appellant's contention in *Slone v. Slone,* 2 Met. (Ky.) 339, and against it in *Schnaderbeck v. Worth,* 8 Abb. Pr. 37; the first holding that the successive assaults are parts of the same transaction; the latter holding that they are separate transactions. The *Schnaderbeck Case* is supported by a similar holding as to mutual slanders, occurring in the same conversation, in *Sheehan v. Pierce,* 70 Hun, 22, 23 N. Y. Supp. 1119. These are all the authorities we have found on the subject, and we may consider them pretty evenly balanced; for, while we are inclined to yield special consideration to the views of the New York courts on matters of Code practice, yet only inferior courts have passed upon this question in that state, and are antagonized to the highest court of Kentucky. Considering the subject, then, as *res integra,* we must recognize that the theory of mutual assaults in a continuous encounter is reached in *Dole v. Erskine,* 35 N. H. 503, by declaring them separate and successive transactions, from which the deduction that they were not counterclaimable against each other would be obvious if the word "transaction" is used in our statute (sec. 2656, Stats. 1898) in exactly the same sense as in the case last cited. Doubtless the circuit court so assumed, and decided accordingly, but is that assumption unavoidable? The word must be used in a very limited and technical sense in order to say that, as each party gains ascendancy in a continuous fracas, the one transaction terminates and a new and separate one commences. Will such strictness and narrowness give due effect to the beneficent purpose of our statute authorizing counterclaim to a tort action on a demand arising out of the same transaction set forth in the complaint as the foundation of the plaintiff's claim? That purpose, doubtless, is to enable ultimate judgment fully settling all the rights of the parties growing out

of the transaction which the plaintiff lays before the court, so that it shall not be necessary to go over it a second time to conclude the controversy between the same parties. To accomplish this purpose, it seems to us more reasonable to hold that the word "transaction," in the statute, is broad enough to include an entire, continuous physical encounter, and that, upon counterclaim, defendant may have recovery for his damages resulting from any assault committed on him by plaintiff in the course of those events which must, of necessity, be fully established and considered in the trial of plaintiff's demand.

Again, error is assigned because, after defendant had offered in evidence certain selected extracts from plaintiff's deposition, taken under sec. 4096, Stats. 1898, the latter was permitted to offer the whole of that deposition, over defendant's objection. That objection, however, was general, as also the exception; and as some parts of the deposition clearly related to, and served to qualify and explain, the extracts which defendant had introduced, it can hardly constitute reversible error, although other parts were inadmissible.

A further objection to certain testimony as to the degree and time of plaintiff's disablement was overruled, but the jury were instructed not to allow any damages for loss of time, because not alleged in the complaint. In this was no error, for the evidence was admissible to show the extent of plaintiff's injuries for which general damages were claimed.

Again, refusal to give *in hæc verba* an instruction requested by defendant cannot be considered, for no exception was taken until after the trial. The right to take exceptions after trial rests on sec. 2869, Stats. 1898, and is confined to the charge itself. *Firmeis v. State,* 61 Wis. 140, 20 N. W. 663; *Little v. Iron River,* 102 Wis. 250, 78 N. W. 416.

The same reason precludes consideration of the various remarks by plaintiff's counsel of which complaint is now made, with one exception, to be noticed later. The record discloses neither objection nor exception when those remarks

were made, but merely written exceptions thereto filed after the trial. No opportunity was thus afforded either to the counsel to correct them, or to the trial court to rule upon them. Appellant, by his silence, must be held to have waived objection thereto. *Firmeis v. State, supra; Hacker v. Heiney,* 111 Wis. 313, 320, 87 N. W. 249.

One remark of plaintiff's counsel is not thus excluded from consideration, it having been objected to when made. It occurred in the closing argument, and is as follows:

"I know *Clancy*. If there is $500 on the table, and *Clancy's* honor on that table, and *Clancy* was going to lose both, you can bet on one thing,—that *Clancy* would grab the $500, and let the honor go. *Defendant's counsel:* I except to those remarks of the counsel as improper. *By the court:* Well, Mr. Barber, that is rather questionable. I don't know whether it is going any further than counsel has a right to go or not. *Plaintiff's counsel:* Well, I am sorry if my remarks disturb counsel. I could make them stronger. *Defendant's counsel:* I except to that remark."

That the statement objected to, upon its face, is improper, as an attempt to state facts to the jury as of the knowledge of the counsel, and not by way of inference from the evidence which they had a right to consider, is obvious. We have carefully examined it in connection with the rest of the argument, which is embodied in the bill of exceptions, and have sought to bring it within the construction which respondent's counsel claimed for it in the oral argument before us, namely, as merely urging that from the evidence, or from the appearance of witnesses, he inferred that *Clancy's* character was as described; but we can find nothing to warrant that view, or to deprive the remark of its character as an assertion upon the knowledge of the counsel. The statement is made in connection with discussion as to the truthfulness of *Clancy's* testimony, evidently for the purpose of justifying an imputation of falsity thereto. We fully appreciate that, in the heat of argument, fervor and partisanship are to be expected from

counsel, and that, within their proper field, they constitute a virtue, rather than the reverse; but this cannot justify departure from the field of argument and discussion of the facts disclosed by the evidence, into the field of testimony by the counsel, to establish other facts. Counsel have no right to avail themselves of the opportunity of addressing the jury in argument to make assertions upon their own knowledge, which, if admissible at all, could be so only under the sanction of a witness's oath. We cannot avoid the conviction that that line was crossed in the present case. Nor can we escape the conclusion that prejudice may well have resulted. If the jury could be made to believe that *Clancy* was a man to whom money was of more importance than honor, they might well be led thereby to disbelieve his story where it was in conflict with that of other witnesses. That solemn statements of fact, not by way of argument and deduction from the evidence, but as of the counsel's own knowledge, are likely to have weight with juries, cannot be doubted. The respectability and standing of counsel only serve to enhance the peril. That such conduct necessitates reversal, unless absence of prejudice clearly appears, has been often decided. *Brown v. Swineford,* 44 Wis. 282, 292; *Hardtke v. State,* 67 Wis. 552, 30 N. W. 723; *Schillinger v. Verona,* 88 Wis. 317, 323, 60 N. W. 272; *Sullivan v. Collins,* 107 Wis. 291, 298, 83 N. W. 310; *Atherton v. Defreeze* (Mich.) 88 N. W. 886. In the light of such authorities, we are constrained to the holding that these remarks and the ruling, or, rather, absence of ruling, thereon constitute prejudicial error, necessitating reversal.

Error is assigned for that the court gave a large number of instructions requested by the plaintiff, not applicable to any specific questions, and dealing generally with the rules of law applicable to the case, and, further, that he did not inform the jury that such instructions were requested by the plaintiff; also that, when he gave certain instructions re-

quested by the defendant, he did inform the jury that they were so requested. The exception saved does not raise the impropriety of giving the plaintiff's instructions generally, without indicating their applicability, if any, to the questions of the special verdict,[1] and we need not add to what has already been said on that subject in *Rhyner v. Menasha,* 107 Wis. 201, 83 N. W. 303, and cases there cited. The characterizing of instructions as requested by one party or the other, or the failure to so characterize them, we are not inclined to hold ordinarily to be reversible error. In the case of a special verdict it is not advisable practice. The province of the court is to inform the jury only of their duty in answering the specific questions, with such definition of the terms used in those questions as may be necessary to that end. It is of no importance to the jury whether such information is given in words selected by either counsel or by the court. The instruction, when given, is that of the court; and the better practice is to make no distinction between that portion which originates with the judge or that which originates with either counsel.

It is also assigned as error that the court instructed the jury generally on the rules of law and upon the rights of the parties, some of the instructions being such as to fully inform the jury of the effect on the rights of the parties of the answers to questions in the special verdict. This criticism seems to be borne out by the record. In instructing upon the second question, the jury are told that, if the party first assaulted uses excessive force to repel the assault, he becomes himself the aggressor, *and liable.* This was wholly unnecessary to enable the jury to answer the simple question whether the party first assaulted did use excessive force; but, if the jury were desirous of favoring one side or the other, it taught them the efficacy of answering "Yes" or "No" to that ques-

[1] The exceptions to the instructions given at the request of the plaintiff were upon the ground that they were "contrary to law and contrary to the evidence."—REP.

tion. In instructing upon the fourth question, namely, whether the defendant, although the first aggressor, might recover damages, a further instruction was given, even more efficacious in pointing out to the jury the effect of their answer to the second question. The court said:

"Even if you should find that the defendant struck the first blow, but should find also that the plaintiff used more force than was reasonably necessary in repelling the assault or defending himself, then the plaintiff is not entitled to recover damages, but the defendant would be."

This instruction falls squarely within the reasons stated in *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 225, 78 N. W. 442; *New Home S. M. Co. v. Simon,* 104 Wis. 120, 126, 80 N. W. 71; *Musbach v. Wis. Chair Co.* 108 Wis. 57, 70, 84 N. W. 36; *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26. Under the authority of those cases, we must hold that reversible error was committed in imparting it to the jury.

We find no other assignments of error which demand discussion. Upon those presenting the improper remarks of respondent's counsel, and the giving of a general instruction to the jury informing them directly of the result of their answers to special verdict, reversal must be pronounced.

By the Court.—Judgment reversed, and cause remanded for a new trial.

WINSLOW, J., took no part.

STRANG and others, Respondents, vs. THOMAS, imp., Appellant.

May 13—June 19, 1902.

Limited partnership: Failure to comply with statutes: Liability of special partners: Transferee of interest: Winding-up action: Judgment: Apportionment of liability.

1. Where, in violation of sec. 1716, Stats. 1898, the business of a limited partnership is transacted by directors elected by the special partners, the latter become liable to creditors as general partners.

2. Failure of a limited partnership to put up the sign required by sec. 1713, Stats. 1898, renders the special partners liable to creditors as general partners.
3. Renewal or continuance of a limited partnership beyond the time originally fixed for its duration, without having such renewal certified, acknowledged, and recorded as required by sec. 1711, Stats. 1898, renders all the partners liable for all the debts of the original partnership.
4. One who purchased from the general partners an interest, representing a certain number of shares, in a limited partnership which had failed to conform to the requirements of secs. 1713, 1716, Stats. 1898, and who, at the expiration of the original agreement, signed an agreement for a continuance of the business for a certain time, without complying with sec. 1711, was liable as a general partner for all the debts of the company, even though he did not know the actual facts and did not intend to become a general partner; and he cannot complain of a judgment holding him liable only for a proportionate share of such debts.
5. In an action to wind up the affairs of an invalid limited partnership, a judgment apportioning the indebtedness among the solvent members according to their holdings, giving them the right to call upon the insolvent ones for contribution at any future time, is not erroneous as against one of such solvent members.
6. Judgment was properly rendered in such case against such of the members as were within the reach of the process of the court, and against members who had purchased the interests of retiring members; and the omission therefrom of those who, before any of the debts existing at suspension were contracted, had sold their interests to solvent members against whom judgment was rendered, was not erroneous

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

In 1890 the defendants J. B. and W. Brimer owned and operated a yarn and woolen mill in the town of Orion, in Richland county. They were desirous of doing business on a more extensive scale, but, not having the capital, they solicited residents of Richland Center to join in the organization of a company. The proposition met with favor, and at a meeting held April 12, 1890, of the parties interested, articles of agreement were submitted and considered. At a later date

in the same month the agreement was entered into, and officers and directors were elected. The written articles provided that the parties should become copartners in the business of manufacturing wool into yarn and cloth. The Brimers were to be general partners, and furnish their machinery at the price of $3,500 as their share of the capital, and the others were to be special partners, contributing the sum of $4,000, each holding interests, as specified in the agreement, according to the amount each contributed. The agreement provided for the election of a superintendent, and the special partners were to elect three directors; such special partners having one vote for each $100 contributed. The agreement made provisions for the manner in which the business was to be conducted, and specified that "the division of the profits or losses in conducting the business shall be equal, and in proportion with amount of stock held by each party." It was to continue for five years. The attempt was to form a limited partnership under the statutes, but they failed to comply with several of its provisions. No sign, as required by sec. 1713, Stats. 1898, was put up, and the business was transacted largely by officers and directors elected by the members, instead of by the general partners. In January, 1891, they increased their capital to $10,000, and "shares" were thereafter issued to the members amounting to $2,300, so that the total amount paid in was $9,800. On January 22, 1891, F. P. Lawrence, who had contributed $200 to the original capital, sold his interest to the defendant A. L. Hatch. January 14, 1891, Isaac McCann sold his interest, amounting to $100, to the plaintiff *J. W. Lybrand,* and in March, 1891, Geo. Bennett sold his interest, amounting to $200, to the plaintiff *W. H. Pier.* On February 14, 1891, the Brimers transferred $1,000 of their interest to the defendant *C. G. Thomas.* At the meeting in January, 1891, it was voted to issue certificates of stock to the members for the interest each held, and certificates were so issued, including

one for $1,000 to *Thomas*. The business was conducted for five years, but was unprofitable. The company was then $4,000 or $5,000 in debt. All the members knew that the business had been unprofitable, but, in hopes that it might be made to pay, on May 1, 1895, all the members signed an agreement to continue the business for three years. Subsequently, the company borrowed more money. Business was continued for a time, and finally ceased. Attempts were made at various times to settle the affairs of the partnership, which failed. This action was commenced to wind up the affairs of the company, and a receiver was appointed. All of the creditors, and all of the original signers, and such as subsequently came in, were made parties. The court found the debts to be $9,787.38 and the net assets $1,843.30, the net indebtedness being $7,944.08. He also found that the partnership, from the beginning, was a general one, and all the members were liable for the indebtedness in proportion to the interest each had in the business. The defendants J. B. Brimer, W. Brimer, and H. T. Bailey were found to be insolvent. Judgment was entered against each of the other parties interested in the concern for his proportionate share of the debts, according to his interest therein, less the net assets, saving, to the parties who paid, the right to enforce contribution from the ones who were found to be insolvent. No judgment was entered against Bennett, McCann, or Lawrence. The amount found due from the appellant, *C. G. Thomas,* was $1,168.20. All parties acquiesced in the judgment except *Thomas,* who brings this appeal.

F. W. Burnham, for the appellant.

For the respondents there was a brief by *K. W. Eastland* and *Jones & Stevens,* and oral argument by *Burr W. Jones.*

BARDEEN, J. This action is one in equity to settle up the affairs of a defunct partnership. The original purpose evidently was to form a limited partnership under the statutes,

but the scheme adopted was contrary to the statute, in that it allowed the business to be controlled by directors chosen by the limited partners. Stats. 1898, sec. 1716. The company failed to post the notice required by sec. 1713, and neglected other requirements not necessary to be mentioned. Such partnerships exist only by virtue of the statute, and unless there is substantial conformity to its requirements the special partners become liable to creditors as general partners. See *Lancaster v. Choate,* 5 Allen, 530; *Durant v. Abendroth,* 69 N. Y. 148, 97 N. Y. 132; *Waters v. Harris,* 17 N. Y. Supp. 370, 28 Abb. N. C. 192; *Vandike v. Rosskam,* 67 Pa. St. 330.

At the expiration of the time limited by the original agreement they agreed upon a renewal, but failed to comply with the requirements of sec. 1711 by failing to have such renewal certified, acknowledged, and recorded, and by failing to give the proper notice. The obligations of the parties in such case are thus stated in Troubat, Lim. Partn. § 337:

"On the renewal of a limited partnership after the expiration of the former one, or before such expiration, or upon the formation of a new partnership, special partners who carry the capital of the first concern into the newly formed one render themselves liable *in solido* for all the debts of the original partnership. And this obligation is indivisible; it involves all the partners in the same liability. It will make no difference that the capital of the prior partnership has been converted into shares destined for the second one, even with the intention to assign those shares to the creditors for the purpose of satisfying them."

But it is said the appellant did not know the actual facts, and did not intend to become a general partner. That may be granted, and still he may not escape liability. In February, 1891, he purchased from the Brimers an interest in the business, which, according to their agreement, represented ten shares in the concern. It was his duty to ascertain what he was purchasing and what obligations he assumed by

becoming a member. He held his interest until the original agreement expired. In May, 1895, with knowledge that the business had been unprofitable, he signed an agreement to continue the business for three years. The business was continued at a loss, and he now seeks to escape the responsibility of contribution because he did not intend to make himself liable. If the business had been profitable, no doubt he would have accepted his share of profits without objection, and could legally have demanded it. The situation being reversed, he must accept the consequences. All of the indebtedness found due at the final wind-up was incurred after he became a member of the company, and was incurred in a *bona fide* attempt to carry on the business to a profitable issue. Claiming, as he did, the right to a proportionate share in the profits had any been realized, he ought not to complain when called upon to share losses on the same basis. As a general partner he was liable, with the other members, for all the debts of the company; so the fact that the court only held him liable for a proportionate share is really more favorable than he was strictly entitled to.

The apportionment of indebtedness among the members who were solvent, according to their holdings, was fully justified. The creditors who were not members had a technical right to collect against any or all of the members of the company, but they are not here complaining. The judgment adjudges the equities of the members according to the original agreement, and gives the solvent ones the right to call upon the insolvent members for contribution at any future time. We do not think it open to criticism in that regard.

The appellant further complains that no judgment was given against Bennett, Lawrence, and McCann. These men signed the original agreement, but sold their interests before any of the debts that were in existence at the date of the final suspension of business had been contracted. They sold to men who are included in the list of solvent members, and

against whom judgment was rendered. Moreover, Bennett and McCann were nonresidents when the suit was begun. Judgment was properly rendered against such of the members as were within the reach of the process of the court, and against members who purchased the interests of the retiring members. We see no ground for disturbing the judgment.

By the Court.—The judgment is affirmed.

HERRELL, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

May 13—June 19, 1902.

Railroads: Killing of horse on track: Contributory negligence: Court and jury: Animals trespassing on highway.

1. In an action against a railway company for the killing of a horse, the evidence, though circumstantial, is *held* sufficient to support a finding of the jury that the horse went upon defendant's right of way over a defective cattle guard, and while there was struck by a passing train.
2. A pasture gate on a highway, a mile and a quarter from a railway crossing, was opened to drive cows to the closely adjoining barnyard, and was allowed to remain open about half an hour while the cows were being milked. When the gate was opened plaintiff's horses were in the pasture, seventy rods away. They were quiet, and with no known tendency to escape. Their barn was in the opposite direction from the railway, and it does not appear that there was anything likely to attract them toward the track. *Held* that, although plaintiff knew that one of the cattle guards at the crossing was defective, the question whether he was guilty of contributory negligence in leaving the gate open was one for the jury.
3. The fact that animals are astray or trespassing upon the highway whence they go upon a railway right of way over a defective cattle guard, does not exempt the railway company from its liability for injury to such animals, imposed by sec. 1810, Stats. 1898.

APPEAL from a judgment of the circuit court for Lafayette county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action for loss of a horse by negligence of defendant. The evidence tended to prove the following state of facts:

Plaintiff lived on a farm about a mile and a quarter west of a highway crossing known as "Fox Crossing," on the defendant's right of way. On the 6th of November, 1900, at about 4 o'clock in the afternoon, his brother opened the gates of a pasture near the house, and drove certain cows up to the barnyard to be milked, and returned them after milking,—an interval of about half an hour,—leaving the gate open meanwhile. When the cows were let out, three horses or colts were grazing at the further side of the same pasture. They had been pastured all summer, and were quiet horses, never breaking out. The next morning one of the three horses was found killed on the south side of the highway crossing aforesaid, about eight feet east of the track, apparently by collision with a train. Tracks of all three horses were observed from the gate of plaintiff's pasture above mentioned to this crossing. On the north side of the crossing the cattle guard was defective, and had been for a long time, to the knowledge of the plaintiff, and, as the jury found, to the knowledge of the defendant. The tracks of a single horse were found crossing the cattle guard, and making their way several hundred feet northward, within the railroad right of way, and then returning along the center of the track. They indicated that the horse was running, and terminated so near the cattle guard that another jump would have reached it. Horse hair appeared upon the cattle guard and along the crossing. Splinters, claimed to be fragments of the pilot of an engine, were found near the cattle guard, both north and south of it. About an hour and a half after the time of opening the pasture gate a special cattle train of defendant passed over the crossing, southward. The night was foggy, so that the headlight illuminated only about a car's length of the

track ahead of the engine. As the engine reached the crossing, two horses suddenly rushed across it from west to east. Neither of the engine force testifies that one of these horses was struck, though one said that he thought so, and the pilot was found broken upon examination. They deny presence of any horse on the track north of the crossing.

The complaint seeks recovery from the defendant by reason of the defective condition of the cattle guard, charging no negligence in the operation of the train. After a motion for nonsuit and to direct a verdict, a special verdict was taken, in which it was found that the horse which was killed had gone into the right of way over the defective cattle guard and that the train came along and struck him while he was in there; that he was not on the highway crossing when struck; that the cattle guard was defective, and had been so for a long time, and that defendant's employees had knowledge of its condition; and that plaintiff's brother was guilty of no want of ordinary care in leaving the pasture gate open while milking the cows, knowing the horses to be loose in there. A question whether such negligence on the part of plaintiff's brother contributed was not answered. After the verdict the defendant moved, first, to change the answer to the question as to contributory negligence from "No" to "Yes," and to answer the question as to whether it contributed in the affirmative, and to render judgment thereon. This being overruled, defendant moved to set aside the verdict and grant a new trial, which was also overruled, and judgment entered for the plaintiff for damages and costs, from which the defendant appeals.

For the appellant there were briefs by *Orton & Osborn,* and oral argument by *P. A. Orton.*

For the respondent there was a brief by *Wilson & Martin,* and oral argument by *R. J. Wilson.*

Dodge, J. Appellant's first position involves the contention that there was no evidence justifying the inference of the

jury that the horse which was killed was, at the time of being run down, within the right of way of the defendant, so that the event could be ascribed to the defective condition of the cattle guard. After a careful perusal of the evidence, we are unable to concur in this view. The rule has been many times declared in this court that if there is any credible evidence, which, if believed by the jury, might support their conclusions, it is not for this court, upon appeal, to set them aside. In this case the evidence is circumstantial, but there is evidence which, if believed, tends to prove that a horse did cross into the right of way over the defective cattle guard; that he came onto the track some 1,200 feet north, and thence ran toward the crossing; that horse hairs were found upon the cattle guard; and that the plaintiff's horse was killed. These facts might justify the inference that the horse so killed, having strayed up the right of way and sought to escape the fast-running train, was run down just before he reached the cattle guard, although there was evidence from other witnesses which, if believed, made that fact impossible.

Appellant further insists that the evidence conclusively establishes contributory negligence in the plaintiff. The facts as to the conduct of the plaintiff's brother, acting for him, are substantially undisputed. The only one upon which negligence can be predicated is the leaving open of a pasture gate a mile and a quarter from the railway during a half hour, while the cows were being milked at the closely adjoining barnyard. While it has been held that it is contributory negligence, in law, to allow horses or cattle to run at large adjoining an unfenced or defectively fenced railroad track, no case justifies, or at any rate requires, an inference of negligence from so slight an act as this. We cannot say that the jury might not, as reasonable men, having knowledge of the custom amongst farmers, decide that such an act as the evidence discloses here was within the care customarily exercised by ordinarily careful persons under like circumstances.

The horses were some seventy rods away from the gate, quiet and gentle, with no known tendency to escape from the pasture. Their barns were in the opposite direction from the railroad, and no evidence discloses anything likely to attract them in the direction of the latter. We must hold that the inference as to negligence from such conduct was within the province of the jury, and that we cannot set aside their decision thereon.

Appellant's third assignment of error, as argued in its brief, is based upon the contention that the horses, being astray upon the highway, were, in legal effect, trespassers thereon, and that defendant owed to them no active duty of care. This contention rests upon the well-known rule that one maintaining a dangerous place by the common law owes a duty of care to prevent injury thereby only to those lawfully or by his invitation subjected to the peril. It, however, overlooks the consideration that the duty and the liability of railroads with reference to fences and cattle guards are not merely such as the common law imposes, but are regulated and increased by statute. Sec. 1810, Stats. 1898. The duty to exercise care in maintaining such structures is absolute, and is due to all persons. Liability for breach of that duty is also absolute, except for contributory negligence on the part of the person suffering injury. Hence the fact that animals are trespassers on the land whence they come in contact with a defective railroad fence or cattle guard in no wise exempts the company from the liability imposed by the statute, which contains no such exception. *McCall v. Chamberlain,* 13 Wis. 637; *Dunnigan v. C. & N. W. R. Co.* 18 Wis. 28; *Pitzner v. Shinnick,* 39 Wis. 129; *Curry v. C. & N. W. R. Co.* 43 Wis. 665, 684.

We find none of the errors which are argued by appellant well assigned.

By the Court.—Judgment affirmed.

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LA CROSSE BROWN HARVESTER COMPANY, Respondent, vs. GODDARD, Appellant.

May 13—June 19, 1902.

Corporations: Payment for stock in property: Assessments: Pleading.

1. The twenty per centum of the par value of one half of the capital stock, which, under sec. 1773, Stats. 1898, must have been actually paid in before a corporation may transact business with others than its members, may be paid in labor or property estimated at its true money value.
2. An allegation that calls or assessments on corporate stock were made by the directors pursuant to the by-laws of the company and pursuant to the authority in them vested, and that defendant had due and personal service and notice thereof, is *held*, on demurrer, sufficiently to allege that the assessments were made and notice thereof given as prescribed by the by-laws of the corporation.
3. An allegation that a certain percentage of the par value of stock was assessed upon each and every share, sufficiently shows that the assessment was equal and uniform upon all subscribers to the stock.

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Morris & Hartwell,* and oral argument by *Thomas Morris.*

For the respondent there was a brief by *C. W. Graves* and *E. C. Higbee,* attorneys, and oral argument by *Mr. Graves.*

CASSODAY, C. J. This is an appeal from an order overruling a demurrer to the complaint in an action to recover $250, the amount of the second and third assessments on ten shares of the capital stock, of $100 each, subscribed by the defendant in the plaintiff corporation. The complaint alleges, in effect, that August 18, 1897, the defendant and others associated to manufacture a patent machine known as "Brown Binder," and subscribed to an agreement whereby they respectively promised to pay for the number of shares set oppo-

site their respective names, at the par value of $100 per share, in such corporation to be thereafter organized, such corporation to have 2,000 shares of $100 each; that 1,000 shares were to be issued to the owners of the patent, who were, in consideration therefor, to assign the patent to the corporation, and the same were to remain non-assessable, and to be issued as fast as assessable stock should be subscribed; that the other 1,000 shares were to issue to subscribers to be paid for in cash, upon assessments from time to time as needed and required, as therein provided; that additional and assessable stock might be authorized in cash not less than par; that there was to be no change in the binder without the consent of the inventor, but all improvements were to belong to the corporation; that subscribers were not to be liable until, on investigation, the patent was found to cover the machine patented, and not an infringement of any other patent; that the board of directors were to be elected by a two-thirds vote; that the owners of the patent agreed to accept nine shares of stock for every ten shares subscribed, until 1,000 shares of assessable stock should be issued; that the defendant, at the time of signing such agreement, subscribed for ten shares of stock of $100 each in the corporation to be thereafter organized; that December 9, 1897, the plaintiff was incorporated by the defendant and others, and that verified articles of incorporation were duly recorded in the register's office, December 9, 1897, and filed in the office of the secretary of state, December 16, 1897; that January 5, 1898, the corporation was organized, and the defendant participated in the election of officers, and was elected as one of the directors; that more than one half of the capital stock had been duly subscribed, and twenty per cent. of the par value thereof actually paid in "in money and property estimated at its true money value;" that the investigation mentioned had been had, and the report thereof accepted, ratified, and approved at a general meeting of the subscribers, at which

the defendant was present and participated; that thereafter, and before any assessment was made upon the capital stock subscribed, the owners of the patent assigned the same to the corporation, with all rights and privileges under the same, together with all patterns and machines, all of which became and are the property of the plaintiff; that, relying upon such subscription of the defendant and others, the plaintiff had expended money and incurred liabilities in the construction and introduction of the Brown binder to the amount of $5,000; that pursuant to the by-laws of the plaintiff, and the power vested in them, the directors had made three several calls or assessments upon the subscribers to the capital stock for the purpose of meeting the needs of the corporation, the first of which had been duly paid by the defendant; that January 6, 1900, the directors duly made and voted a second assessment of ten per cent., or $10, on every share so subscribed, and upon the subscribers thereto, to be paid January 25, 1900, and that the defendant had due and personal notice thereof January 15, 1900; that March 6, 1900, the directors duly made and voted a third assessment of fifteen per cent., or $15, on every share of stock so subscribed, and upon the subscribers thereto, to be paid April 15, 1900; and that the defendant had due and personal notice thereof April 5, 1900; that such last two calls or assessments amounted to $250; that, although the same became due and payable as stated, yet the defendant had not performed his agreement, and had wholly omitted, neglected, and refused to pay any portion of either of such assessments, and that the defendant is justly indebted to the plaintiff on account thereof in the sum of $250, with interest upon each assessment from the time it became due; and demanded judgment accordingly.

1. In support of the demurrer counsel seem to rely on *Anvil M. Co. v. Sherman,* 74 Wis. 226, 42 N. W. 226, in which it was held that "in an action to recover a call or assessment the complaint must aver compliance with sec. 1773"

of the statutes, wherein it is declared that "no such corporation shall transact business with any others than its members until at least one half of its capital stock shall have been duly subscribed, and at least twenty per centum thereof actually paid in." *Milwaukee B. & C. Co. v. Schoknecht,* 108 Wis. 464, 84 N. W. 838. But the complaint does allege "that more than one half of the capital stock of said corporation has been duly subscribed and twenty per cent. of the par value thereof actually paid in, in money and in property estimated at its true money value." In fact, the complaint goes still further, and alleges, in effect, that before any assessment was made upon the capital stock subscribed one half of such capital stock had been subscribed by the owners of the patent; and that they had paid into the corporation the whole thereof by assigning the patent to the corporation. The contention that the complaint fails to allege when one half of the capital stock was subscribed and when the twenty per centum thereof was actually paid in is without foundation.

2. Counsel further contends that the complaint "is fatally defective in not alleging that the twenty per centum was paid in cash." But the statute expressly authorized such stock to be issued "in consideration of money or labor or property estimated at its true money value." Sec. 1753, Stats. 1898, as amended by ch. 193, Laws of 1899. The two sections of the statutes cited must, necessarily, be construed together, and, when so construed, they authorize stock to be issued for property or labor as well as cash. This has frequently been sanctioned by this court. *Whitehill v. Jacobs,* 75 Wis. 474, 44 N. W. 630; *Nat. Bank of Merrill v. I. & W. L. Co.* 101 Wis. 247, 77 N. W. 185. See, also, *Milwaukee C. S. Co. v. Dexter,* 99 Wis. 229, 230, 74 N. W. 976; *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 489, 81 N. W. 1064; *Van Cleve v. Berkey,* 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593.

3. It is further contended that the complaint is defective

in failing to allege that such assessments were made and notice thereof given as prescribed by the by-laws of the plaintiff corporation. In support of such contention counsel cite sec. 1754, Stats. 1898, and *Germania I. M. Co. v. King,* 94 Wis. 439, 69 N. W. 181; *North Milwaukee T. S. Co. v. Bishop,* 103 Wis. 492, 79 N. W. 785. But the complaint does expressly allege that the directors of the plaintiff made the "three several calls or assessments pursuant to the by-laws of said company, and pursuant to the power and authority in them vested," and for the purpose of meeting "the needs of said corporation;" and that the defendant had due and personal service and notice of the said calls or assessments so required.

4. Counsel contends that there is a failure to allege in the complaint that "the assessments or calls were equal and uniform upon all subscribers to the capital stock." But the complaint alleges in each instance that the per cent. named was so assessed upon each and every share. We must hold that the complaint states a good cause of action.

By the Court.—The order of the circuit court is affirmed.

LA CROSSE BROWN HARVESTER COMPANY, Respondent, vs. STOREY, Appellant.

May 13—June 19, 1902.

La Crosse Brown H. Co. v. Goddard, ante, p. 610, followed.

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Morris & Hartwell,* and oral argument by *Thomas Morris.*

For the respondent there was a brief by *C. W. Graves* and *E. C. Higbee,* and oral argument by *Mr. Graves.*

CASSODAY, C. J. This is an appeal from an order overruling a demurrer to the complaint in an action to recover $600 as the balance due upon the first, second, and third assessments on twenty shares of the capital stock, of $100 each, subscribed by the defendant in the plaintiff corporation, and that no part of such assessments had been paid, except $100. The facts alleged are substantially the same as in the case of *La Crosse Brown H. Co. v. Goddard, ante,* p. 610, 91 N. W. 225, in which an opinion is filed herewith, except the amount, and as to the first assessment. For the reasons given in the opinion filed in that case, we think the demurrer was properly overruled.

By the Court.—The order of the circuit court is affirmed.

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ALLEN and others, Appellants, vs. ALLEN and others, Respondents.

May 13—June 19, 1902.

(1-3) *Tax titles: Filing proof of publication of notice of sale: Posting of notices.* (5) *Depositing statement with county clerk: Mandatory or directory statutes.* (6, 7) *Collection of real estate taxes from personalty: Treasurer's return conclusive.* (8, 9) *Tenants in common: Purchase of tax title by one.* (4) *Appeal: Findings: Exceptions.*

1. Under sec. 1132, Stats. 1898 (providing that the affidavit of publication of the delinquent list and notice of sale shall be transmitted to the county treasurer immediately after the last publication, and if not so transmitted within six days the printer shall not be paid for the publication), a failure to file the affidavit until ten days after the last publication did not invalidate the sale.
2. Affidavits showing the posting of a notice of tax sale "at" four public places in the county, sufficiently show a posting "in" such places, as required by sec. 1130, Stats. 1898.

3. The posting of a notice of tax sale at "the inside door" of the county treasurer's office will be presumed to be a posting in a "conspicuous place" in such office, within the meaning of sec. 1130, Stats. 1898.
4. A finding of fact not excepted to cannot be reviewed on appeal.
5. Sec. 1141, Stats. 1898, providing that the county treasurer shall, immediately after the tax sale, deposit in the office of the county clerk a statement containing a description of each parcel sold, specifying the name of the purchaser, the amount, and the name of the owner, etc., is directory, not mandatory, and a failure to comply therewith does not invalidate the tax deed. *Pier v. Oneida Co.* 93 Wis. 463, limited. BARDEEN, J., dissents.
6. Taxes upon real estate must, if possible, be collected from the personal property of the owner or occupant.
7. The verified return of a town treasurer, made under sec. 1114, Stats. 1898, stating that he was unable to find any personal property out of which to collect the tax upon real estate, is conclusive upon that question, so far as the validity of the tax sale is concerned.
8. One of several tenants in common, all of whom derive their title as heirs of their father, cannot acquire an outstanding tax title and assert it against his cotenants, even though he was not in possession of the land or under obligation to pay the taxes for which it was sold.
9. In such a case one of the tenants in common, not himself in possession of the land, purchased an outstanding tax title, and afterwards conveyed one half of the property to a cotenant in possession who should have paid the taxes for which the land was sold. It did not appear that the purchase was made collusively for the benefit of the latter. *Held* that, to entitle the other tenants to have the tax title held for the common benefit of all, they should be required to pay their proportionate shares of the amount paid therefor, not merely of the amount necessary to redeem from the tax.

APPEAL from a judgment of the circuit court for Vernon county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action in equity to set aside a tax title upon eighty acres of land upon the ground of various irregularities in the tax proceedings, and upon the further ground that the relations of the parties were such that the purchase of the tax title by the defendant *C. W. Allen* constituted in law a pay-

ment of the tax. The plaintiffs are five in number, and are children and heirs at law of one Thomas W. Allen, who died intestate, March 1, 1880, seised of the land in question, and whose estate has never been administered. The defendants *Charles W.* and *Adelbert Allen* are the remaining children and heirs at law of Thomas W. Allen, and the defendants *Maria Mixner* and *Louisa Wernick* are subsequent mortgagees of the land. The action was tried by the court, and the facts were not seriously in dispute, and were substantially as follows:

After the death of Thomas W. Allen, in 1880, his widow, Susan Allen, and all of the children continued to occupy the land until the spring of 1892, when all of the children except the plaintiff *Whit Allen* and the defendant *Adelbert Allen* left home, and thereafter did not live upon the premises. The widow, with the plaintiff *Whit* and the defendant *Adelbert,* however, continued to occupy the premises as actual tenants during the season of 1892, using them for agricultural purposes, under an arrangement to share the products equally. The taxes on the land for the year 1892 were not paid, and in the spring of 1893 the land was sold therefor to one Albert Field. The land was assessed upon the tax roll in the name of the widow, Susan Allen. On the 15th of November, 1898, Albert Field received a tax deed of the lands upon his certificate, which deed was recorded on the same day, and on the 22d of November, 1898, he deeded the premises to the defendant *Charles W. Allen.* Upon the same day the widow and the defendant *Adelbert* made a quitclaim deed of the same premises to the said *Charles W. Allen,* who immediately, and on the same day, conveyed the south half thereof to the defendant *Adelbert.* On the same day, *Charles* mortgaged the north half, and *Adelbert* mortgaged the south half, thereof, to the defendant *Maria Mixner,* and upon the 1st day of May, 1899, *Adelbert* made another mortgage upon the south half to the defendant *Louisa Wer-*

nick. The defendants *Charles* and *Adelbert* claim title to said lands under said tax deeds, exclusive of the other heirs. The alleged irregularities in the tax proceedings are fully stated in the opinion.

The court held that the tax deed was valid, and that *Charles W. Allen* acquired a good title to said lands by the deed from Field, whereupon the court dismissed the complaint, and the plaintiffs appeal.

For the appellants there was a brief by *Butt & Butt,* and oral argument by *H. P. Proctor.* They contended, *inter alia,* that heirs or tenants in common are equally bound to pay the taxes on the common property, and one of the heirs or tenants in common, claiming title, cannot acquire a tax title based on taxes against the property. *Bassett v. Welch,* 22 Wis. 175; *Jones v. Davis,* 24 Wis. 229; *Whitney v. Gunderson,* 31 Wis. 359; *Link v. Doerfer,* 42 Wis. 391; *Smith v. Lewis.* 20 Wis. 350; *Burchard v. Roberts,* 70 Wis. 111–118. This is so, even though such title be acquired through an innocent third party, for one cannot do indirectly what he cannot do directly. And a purchase thus made by one of the tenants in common enures to the benefit of all. *Wright v. Sperry,* 21 Wis. 331; *Swift v. Agnes,* 33 Wis. 229; *Goralski v. Kostuski.* 179 Ill. 177, 53 N. E. 720; *Du Bois v. Campau,* 24 Mich. 360; *Van Horn v. Fonda,* 5 John. Ch. 406; *Parker v. Brast.* 45 W. Va. 399, 32 S. E. 269; *Falkner v. Thurmond* (Miss.) 23 So. 584; *McChesney v. White,* 140 Ill. 330, 29 N. E. 709; *Dray v. Dray,* 21 Oreg. 59, 27 Pac. 223; *Burhans v. Van Zant,* 7 N. Y. 523; *Rothwell v. Dewes,* 3 Black (L. ed.) 613; *Hodgson v. Fowler,* 24 Colo. 278, 50 Pac. 1034; *Lomax v. Gindele,* 117 Ill. 527, 7 N. E. 483; *Boyd v. Boyd,* 176 Ill. 40, 51 N. E. 782; *Hurley v. Hurley,* 148 Mass. 444, 19 N. E. 545. A failure to sell the personal property before resorting to a sale of the realty for nonpayment of taxes, when required by statute, is held by the weight of authority to be sufficient to set aside a tax deed issued on such sale

of realty. *Kean v. Kinnear,* 171 Pa. St. 639, 33 Atl. 325; 25 Am. & Eng. Ency. of Law (1st ed.) 370; *St. Clair v. McClure,* 111 Ind. 467, 12 N. E. 134; *Kittle v. Shervin,* 11 Neb. 65, 7 N. W. 861; *State ex rel. McKenzie v. Casteel,* 110 Ind. 174, 11 N. E. 219; *Helms v. Wagner,* 102 Ind. 385, 1 N. E. 730; *Wartensleben v. Haithcock,* 80 Ala. 565, 1 So. 38; *Sims v. Greer,* 83 Ala. 263, 3 So. 423; *Julian v. Stephens,* 10 Ky. L. Rep. 862, 11 S. W. 6; *Simpson v. Meyers,* 197 Pa. St. 522, 47 Atl. 868; *Wheeler v. Bramel,* 10 Ky. L. Rep. 301, 8 S. W. 199; *Interstate B. & L. Asso. v. Waters,* 50 S. C. 459, 27 S. E. 948; *Phil. Nat. Bank & S. Co. v. Security Co.* 14 Montg. Co. Law Rep. 106; Blackwell, Tax Titles (1st ed.) 209–211, 294. It is the policy of the law to take land by tax deed only when other remedies fail. Blackwell, Tax Titles (1st ed.) 210; *Id.* (5th ed.) § 341. The return of the town treasurer, to the effect that there was no personal property upon which a levy and sale could be made, is not conclusive. *Kean v. Kinnear,* 171 Pa. St. 639, 33 Atl. 325; *Wartensleben v. Haithcock,* 80 Ala. 565, 1 So. 38–42; Blackwell, Tax Titles (1st ed.) 213.

For the respondents there was a brief by *C. W. Graves* and *Ray B. Graves,* and oral argument by *C. W. Graves.* They argued, among other things, that the general scheme of land taxation in Wisconsin is not to make the tax a personal charge against the owner, but rather that the levy is upon the land and the land itself is liable for the tax. Sec. 1051, Stats. 1898. The tax is not a debt in the ordinary sense of that term. *Meriwether v. Garratt,* 102 U. S. 472; *Lane Co. v. Oregon,* 7 Wall. 71; 25 Am. & Eng. Ency. of Law, 12, and cases in note 5; *Hanson Co. v. Gray,* 12 S. D. 124, 76 Am. St. Rep. 591. The statute points out a clear and definite procedure in collecting the taxes on real estate. It first makes the tax a lien, and then proceeds to point out the manner in which the state shall enforce its lien, by public sale of the thing taxed. Undoubtedly the legislature has power to ex-

pressly authorize the collection of land tax by action, but it has never done so, and the present method is exclusive of any other method or remedy. Black, Tax Titles (2d ed.) § 150; 25 Am. & Eng. Ency. of Law, 298, and cases in note 6; *Gatling v. Comm'rs,* 92 N. C. 536, 53 Am. Rep. 432; *Comm'rs v. First Nat. Bank,* 48 Kan. 561; *Montezuma Valley W. Co. v. Bell,* 20 Colo. 175; *Camden v. Allen,* 26 N. J. Law, 398; *Detroit v. Jepp,* 52 Mich. 458; *Hibbard v. Clark,* 56 N. H. 155; *Richards v. Comm'rs,* 40 Neb. 45; *Louisville W. Co. v. Commonwealth,* 89 Ky. 244; *State v. Piazza,* 66 Miss. 426; *Hanson Co. v. Gray,* 12 S. D. 124; *State ex rel. v. Cain,* 18 Neb. 631; *Littler v. McCord,* 38 Ill. App. 147. After the tax sale had been made and the tax deed issued to Field, the defendant *Charles W. Allen's* interest in the land with his cotenants had been absolutely forfeited and no redemption for taxes could be made. At the time he acquired this title he owed these plaintiffs no more of a duty with reference to it than an entire stranger did, and the title obtained by him through the purchaser at the tax sale vests in him as complete a title as Field had. No fraud or conspiracy is proven or attempted to be proven between Field and *Charles W. Allen,* and this is the only theory upon which this title can be said to enure to the benefit of the other cotenants. 17 Am. & Eng. Ency. of Law (2d ed.) 677; *Lewis v. Robinson,* 10 Watts, 354; *Kirkpatrick v. Mathiot,* 4 Watts & S. 251; *Reinboth v. Zerbe Run Imp. Co.* 29 Pa. St. 139; *Keele v. Cunningham,* 2 Heisk. (Tenn.) 288; *Coleman v. Coleman,* 3 Dana, 398; *Watkins v. Eaton,* 30 Me. 529, 50 Am. Dec. 637.

WINSLOW, J. The validity of the tax deed secured by Field is attacked on several grounds, which will be briefly considered in their order.

1. The sale took place May 16, 1893; the last publication of the delinquent list and notice of sale was made May 10th;

the delinquent list and notice was duly published the required number of times, but no affidavit of publication was filed until May 20th, being four days after the sale, and ten days after the last publication. The statute (sec. 1132, Stats. 1898) provides that the printer's affidavit showing the proper publication of the list and notice shall be transmitted to the county treasurer immediately after the last publication, and further that, if the same be not transmitted within six days, the printer shall not be paid for the publication. It is argued that this requirement is mandatory and jurisdictional, and that failure to comply therewith is fatal. The fact of publication for the required time is of course jurisdictional, and it is true also that the affidavit of publication required by the statute is the exclusive proof of such publication, without the filing of which the sale will be held invalid. *Iverslie v. Spaulding,* 32 Wis. 394; *Hebard v. Ashland Co.* 55 Wis. 148, 12 N. W. 437. It has not been held, however, that if the affidavit be not filed within the six days, but be actually filed a few days thereafter, the sale is void. The penalty attached to the six-day requirement is a clear indication that its main object was to compel obedience on the part of the printer. So far as notice to the parties is concerned, every substantial right is as well conserved by the filing of the affidavit ten days after the last publication as by the filing within six days thereafter, providing it be thereafter duly deposited with the county clerk, as was the case here; and, while the rule of strict compliance with all statutory provisions regulating tax sales is well understood, we are not inclined to hold that the variance here shown should invalidate the sale.

2. It is argued that the affidavits of posting the delinquent list and notice of sale were insufficient. The statute requires (sec. 1130, Stats. 1898) that the treasurer shall, at least four weeks before the day of sale, cause to be posted up "copies of such statement and notice in at least four public places in

said county, one of which copies shall be posted up in some conspicuous place in his office;" and also requires (sec. 1132) that an affidavit or affidavits showing such posting shall be made and preserved by him and thereafter deposited with the county clerk (sec. 1141). There were several affidavits of posting duly filed. One affidavit stated that one of the notices was posted up "at the inside door of the treasurer's office," April 17, 1893; three other affidavits showed, respectively, that the notice was, on the 17th day of April, posted up "at the postoffice in the village of Hillsboro in said county," "at the postoffice on the outside of the building in the village of Westboro in said county," and "at the postoffice building in the village of Coon Valley in said county." The claim is that these affidavits do not satisfy the requirements of the statute, and the case of *Hilgers v. Quinney,* 51 Wis. 62, 8 N. W. 17, is relied on in support of the contention. In that case it was held that an affidavit which stated that the notices were posted up at four public places in the village of Chilton in said county,—"one at the Chilton House, one at the drug store of William Mahoney, one at the Washington House, and one at the office of the county treasurer,"—was insufficient, because: (1) Four public places in the village of Chilton were not necessarily four public places so far as the county was concerned; (2) because "at" is not synonymous with "in;" and (3) because it did not appear that the posting in the treasurer's office was in a "conspicuous place." It must be conceded that the decision was an extremely strict one, and we certainly do not feel that it should be extended to a case not squarely within its lines. This court has held (*Hart v. Smith,* 44 Wis. 213) that it will be presumed that postoffices in cities and villages are public places, and that posting therein constitutes posting in public places, though the affidavit does not state that they are public places. There can be no doubt, therefore, that the affidavits in the present case show posting "at" three public places in the county.

Should the "inside door" of the county treasurer's office be presumed to be a "conspicuous place" in such office? We think it should. The words should be given their natural meaning, and they naturally indicate an inner entrance door into the treasurer's office, and hence, necessarily, a conspicuous place in the office. There is only left to be considered the question whether the use of the word "at" instead of "in" is fatal. Notwithstanding what was said on this subject in the *Hilgers Case,* we do not feel that we ought to hold that this variance alone is fatal. The word "post," when used in the present connection, means "to attach to a post, a wall, or other usual place of affixing public notices" (Webst. Int. Dict.); "to bring to the notice or attention of the public by affixing to a post, or putting up in some public place" (Standard Dict.). Giving the word this meaning, it seems certain that posting "at" a public place is substantially the equivalent of posting "in" a public place, and we therefore hold that the affidavits of posting in the present case were sufficient.

3. The statute requires (sec. 1141, Stats. 1898) that the county treasurer shall, immediately after the tax sale, deposit in the office of the county clerk, with all affidavits, notices, and papers relative to the sale, "a statement containing a particular description of each tract or parcel thereof of land so sold by him, specifying the name of the person to whom sold, the amount for which the same was sold, and the name of the owner, if known," and that the treasurer and clerk shall each record such statement in their respective offices. In the present case the court found that the treasurer did not make or file this statement, but that a list of said lands so sold was kept in the county clerk's office, contained in a book called the "sales book," but not signed by the treasurer. This finding was based simply upon the evidence of the county clerk, who became such in 1899, that he had found no list made by the treasurer in 1893 in his office, though he had

made search therefor, but had found the sales book containing the list of the lands sold by the county treasurer in 1893. The sales book is the record referred to in sec. 1141; it should be the recorded copy of the original list filed by the county treasurer under that section, and can only be legitimately made from that original; it appears, then, that this recorded copy is now in the clerk's office; we think it might well be held that its presence in the clerk's office is *prima facie* proof that the original was duly filed, because the record could only be legitimately made from the original list filed. But the court having found as a fact that the original list was never in fact filed, and this finding not having been excepted to by either party, it cannot be reviewed, but must be accepted as a fact.

The question of the effect of the omission to file this statement upon the tax sale and deed seems never to have been discussed in this court. The fact appeared in the case of *Pier v. Oneida Co.* 93 Wis. 463, 67 N. W. 702. In that case, however, two additional defects in the tax proceedings were found, namely: (1) that the delinquent returns of the town treasurer were unsigned, and (2) that no affidavits of posting of notices of tax sale were filed with the county clerk. The tax certificates were set aside by the trial court, and the judgment was affirmed by this court, it being said in the opinion that there could be no doubt that the tax certificates were void on account of the irregularities found by the trial court; and the case of *Ward v. Walters,* 63 Wis. 39, 22 N. W. 844, was cited to support the conclusion. The last-named case was a case in which the tax sale was held void because of failure to properly post the notices of sale. This omission has always been held to be fatal to the validity of the sale; it appeared in the *Pier Case,* and was enough of itself to invalidate the sale, and so it was not deemed necessary to discuss what might have been the effect of the failure of the treasurer to file a statement of the lands sold, if that defect

stood alone. We do not think, therefore, that the *Pier Case* can be considered as a decision that such failure alone would be fatal.

Considering the question in view of the primary object of the requirement, and the decision of this court in the case of *Wright v. Sperry,* 21 Wis. 336, we do not think it should be held that this failure renders the deed void. The list is required to be filed, evidently, for the information of the county clerk, so that he may know by the records in his own office, when parties come to redeem, what parcels have been sold and what sum is necessary to be paid. It is only to a limited extent, if at all, for the benefit of the property owner, for he may ascertain the fact of sale from the list preserved in the county treasurer's office as well as from the list filed in the clerk's office. This court has held in *Wright v. Sperry, supra,* that the requirement that a notice of the expiration of the period of redemption be published six months before such expiration (sec. 1170, Stats. 1898) was directory merely, and that a failure to comply therewith does not avoid the deed. The decision was placed on the ground that the act was one required to be done after the sale, and over which the purchaser has no control, and hence that it ought not to affect his rights; there being no provision prohibiting the issuance of a deed in case the statement is not filed. This decision has not been overruled, and has stood as the unquestioned law for thirty-five years. The reasons on which it is based apply with greater force to the omission of duty here under consideration than to the omission in that case, because the notice of expiration of the time for redemption is plainly intended for the benefit of the property owner alone, and is manifestly of prime importance to him. We hold, therefore, that the requirement that the statement be filed is directory, and not mandatory, and hence that the failure to comply with it does not invalidate the deed.

4. It is urged that the tax deed is void because the evidence

shows that there was ample personal property on the farm, belonging to the occupants, upon which the collecting officer should have levied, and out of which the tax should have been paid. It is undisputed that the town treasurer made the usual verified return upon the delinquent list, stating that he was unable to find any personal property out of which to collect the tax, but the evidence shows that there was considerable personal property on the farm belonging to the occupants, and that no attempt was made to levy thereon. This contention raises two questions: (a) Whether taxes upon real estate are required to be collected from personal property if personal property is to be found; and (b) whether the return of *nulla bona,* made by the collector, is conclusive as to the fact. We are not unmindful of the strength of the argument which is made, to the effect that taxes upon real estate were intended to be collected from the real estate alone, based upon the fact that the statute (sec. 1088, Stats. 1898) makes such taxes a lien upon the land until paid. There are other provisions, however, which seem to indicate a clear purpose that such taxes are to be collected from the personal property of the owner or occupant. Thus, sec. 1097 provides that, in case any person refuses or neglects to pay *the tax* imposed upon him, the treasurer shall levy and collect the same by distress and sale of such person's goods and chattels. Sec. 1043 provides that real property shall be assessed to the owner if known; otherwise to the occupant if ascertainable; otherwise without name. Sec. 1081 provides that the warrant shall command the collector to collect from each of the persons and corporations named in the roll, and from the owners or occupants named of the real estate described therein, the taxes set opposite their respective names and to the several parcels of land therein described, and, in case *any* person or corporation upon whom such tax is imposed shall refuse or neglect to pay the same, then to levy and collect the same by distress and sale of his goods and chattels. Sec. 1113

provides for a return to be made, by the town treasurer to the county treasurer, of delinquent taxes, covering both real and personal taxes which are unpaid; and sec. 1114 provides that he shall attach to the return an affidavit stating that the sums returned as unpaid have not been paid, and that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to the persons charged with such unpaid taxes whereon he could levy the same. Sec. 1154 provides that when a tax on real estate shall have been paid by, *or collected* of, an occupant or tenant, he shall be entitled to recover the same from the person under whom he holds, with interest at twelve per cent. There are other sections which have some bearing on the subject, and all seem to point more or less directly to the conclusion that the legislative intention is that such taxes shall be collected from the personal property of the owner or occupant, if possible.

There seems to have been no case in which the question has been debated and directly decided in this court, although there have been some cases in which it has been recognized that the tax is to be collected from personal property if possible. Thus, in *McLean v. Cook,* 23 Wis. 364, where a tax collector had seized the personal property of an occupant of lands for the payment of the tax levied upon the land, and was sued by the occupant therefor, a judgment in favor of the officer was affirmed. No such result could have been reached unless it was the duty of the officer to collect the tax from the personal property of the occupant. In *Kaehler v. Dobberpuhl,* 60 Wis. 256, 18 N. W. 841, the right of the collector to seize and sell personal property of the owner of real estate, in order to pay a tax levied upon the real estate, is recognized and affirmed without discussion. Doubtless, other cases of a similar nature might be found. We think, therefore, that it must be held that taxes upon real estate are to be collected primarily out of the personalty of the owner or occupant.

This brings us to the question of the effect of the treas-

urer's return of *nulla bona*. Upon this question, there are decisions in other states to the effect that such return is merely *prima facie* evidence of the fact, and may be disproved by parol evidence. See Black, Tax Titles (2nd ed.) § 257, and cases cited. These decisions are, however, based upon statutes quite dissimilar to our own, and afford little help. It is a new question in this state, and we feel at liberty to make our own rule. To us it seems very unwise policy to make a tax deed subject to attack and overthrow, years after its execution, by parol proof of the existence of personal property out of which it might have been collected, when the record shows every step in the proceedings to have been taken in exact accord with the statute. The sworn return must have been intended to serve some substantial purpose. That purpose is evidently to establish the fact that the collector has done his duty in this regard. If it is only to serve as *prima facie* proof, liable to be overthrown by the mere memory of a witness, it is little better than an idle ceremony, and the requirement that such a return be made might as well be dispensed with. We have no hesitation in holding that the return is conclusive, and that the remedy for a false return should be against the officer making it.

We have now discussed all the objections made to the validity of the tax deed, and come to the question whether the defendants *Charles* and *Adelbert Allen* can assert their title as against the plaintiffs. It is sometimes stated as a general principle of law that one cotenant cannot purchase an outstanding title to lands of which he and his cotenants have an imperfect title, and assert such title as against his cotenants, but that such purchase will be held to be made for the benefit of all, and the purchaser will only be entitled to contribution from his cotenants according to their proportionate shares of the estate. The leading case in which the doctrine was definitely laid down is that of *Van Horne v. Fonda*, 5 Johns. Ch. 388, where Chancellor KENT states the proposition in terms

which have been twice quoted with approval by this court. The reason given is that "it is not consistent with good faith, nor with the duty which the connection of the parties as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title and appropriate the whole subject to himself, and thus undermine and oust his companion." In the case of *Frentz v. Klotsch,* 28 Wis. 312, while the general doctrine above stated is recognized, it is suggested that the doctrine may not apply to tenants in common who acquire unconnected interests in the same property by distinct purchases, unless there are some peculiar relations of trust and confidence between them rendering the acquisition of an outstanding title by one inconsistent with good faith. The question was not, however, definitely passed upon in this case. In *Wright v. Sperry,* 21 Wis. 336, the reasoning of Chancellor KENT in *Van Horne v. Fonda, supra,* is cited with apparent approval, but it is said that this doctrine does not go to the extent that in no case can a tenant in common purchase an outstanding title for his own exclusive benefit, and that the doctrine of the *Van Horne Case* applies only where tenants in common are in actual possession of the land, or where one enters as such tenant, and so his possession is the possession of all the tenants. In *Hunter v. Bosworth,* 43 Wis. 583, the opinion was by Chief Justice RYAN, and the language of the *Van Horne Case* was quoted *in extenso,* and applied to the case. It was there further said:

"The rule rests, not upon the strict relation of joint tenants, or tenants in common, but upon community of interests in a common title, creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the others."

This was a case where one of the two chattel mortgagees in common of a stock of goods had secured a subsequent mortgage for another debt on after-acquired goods. The first

mortgage in terms covered after-acquired property, and it was held that the relations between the two mortgagees were such under the first mortgage that the mortgagee who took the second mortgage must apply its proceeds on the first mortgage until it was paid. In *Hannig v. Mueller,* 82 Wis. 235, 52 N. W. 98, one tenant in common in possession acquired an outstanding tax title, and claimed to exclude her cotenants, but it was held that, because she was a tenant in common when she acquired the tax title, she could not hold the same adversely to her cotenants, and that her acquisition of the tax title simply operated as an extinguishment thereof. The subject has been much discussed in the decisions and in the textbooks. 17 Am. & Eng. Ency. of Law (2nd ed.) 674, 675, and cases cited in note 1. Freem. Cotenancy (2nd ed.) §§ 154, 155, 156, 159. In Pennsylvania, the rule seems to have been established that when land has been sold for taxes to a stranger, and the time for redemption has expired, any previously existing cotenancy is determined, and either of the former cotenants may purchase the tax title and assert it against his cotenants. *Lewis v. Robinson,* 10 Watts, 354; Freem. Cotenancy, § 159. This rule, however, has obtained little approval elsewhere. It seems to us that the true rule, and the rule which has been, impliedly at least, adopted by this court, is quite well expressed by Mr. Freeman in his work on Cotenancy, previously cited (at sec. 155), where he says:

"As a rule forbidding the acquisition of adverse titles by a cotenant from being asserted against his companions is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always hold under the same title. Their union of interest and of title is so complete that beyond all doubt such a relation of trust and confidence unavoidably results therefrom that neither will be

permitted to act in hostility to the interests of the others in relation to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances and through different grantors; their only unity is that of right to the possession of the common subject of ownership. . . . An examination of the decisions clearly shows that tenants in common are not *necessarily* prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior, outstanding title, especially where the cotenants are not in joint possession of the premises."

The principle is well understood that a person in possession of lands, and whose duty it is to pay the taxes thereon, cannot suffer the property to be sold for taxes, and obtain a title thereby which he can assert against any one to whom he owed the duty. This rule has been many times applied by this court. *Smith v. Lewis,* 20 Wis. 350; *Bassett v. Welch,* 22 Wis. 175; *Hannig v. Mueller,* 82 Wis. 235, 52 N. W. 98, and cases cited at close of opinion. Under this rule, one tenant in common, in the sole or joint possession of lands, could not buy in an outstanding tax title issued for taxes accruing during his possession, and assert it to cut off his cotenants, whether the cotenancy existed under the same or different instruments. The mere fact of possession, with the resulting duty to pay the taxes imposed, renders the nonpayment of the taxes and the acquisition of a tax title acts of bad faith to his cotenants. But, as we have seen from the preceding discussion, in the case of cotenants whose rights arise under the same instrument or act of the law, such as coparceners, devisees, tenants by entirety, or joint tenants, the union of title and interest is so close, and the relation of the parties so intimate, that from these facts alone a relation of trust and confidence is considered to exist, forbidding the acquisition of an outstanding title by one adverse to his cotenants, regardless of the question

of possession. If, in the last-named case, the cotenant who purchases the adverse tax title be in fact in possession, it simply adds another reason for the rule of disability.

So it must be held, in the present case, that the defendants *Charles* and *Adelbert* cannot assert the tax title secured from Field to cut off the plaintiffs, but that it must be held by them for the benefit of all the tenants, upon condition of the payment by the plaintiffs of the amounts which in equity they ought to pay. Had the purchase of the tax title been made by the tenant in possession, whose duty it was to pay the taxes, or had it been made collusively for his benefit, the plaintiffs should only be required to pay their proportionate shares of the amount necessary to redeem from the tax, regardless of the amount paid for the title; but as the purchase was made by *Charles,* who was never in possession, and no collusion is found between him and *Adelbert,* the plaintiffs should be required to pay into court their proportionate shares of the amount paid by him for the tax title, with interest, which amount is alleged in the complaint, and admitted by the answer, to have been the sum of $100.

The judgment below having been one of dismissal of the complaint on the ground that the plaintiffs had no interest in the property, the question whether the mortgages executed by *Charles* and *Adelbert* to the defendants *Mixner* and *Wernick* constitute liens upon the interests in the property now found to exist in the plaintiffs was not covered by any finding, nor was the question mentioned in this court, either in printed brief or oral argument. The record shows nothing to impeach the validity of the mortgages as against the interests of the makers, but whether they constitute liens upon the undivided shares of the plaintiffs is a legal question, which, if contested, should only be decided after proper presentation and argument of the question by counsel. We do not deem it proper to decide it now, and we therefore remit the cause to the trial court without direction upon this point, except the

direction that the question, if raised, be considered and determined by the trial court, and that the rights of the mortgagees be protected in the final judgment.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment in accordance with this opinion.

BARDEEN, J. I agree with the conclusions stated in the opinion filed in this case except in so far as it holds that the requirements of sec. 1141 are directory, merely. In that regard, I think the opinion runs counter to the spirit of many decisions of this court, and is contrary to the evident purpose of the legislature. All tax proceedings are necessarily adversary proceedings. The power to sell land for taxes had no existence at common law. It exists only by virtue of statute law. It is harsh in its operation and merciless in its results. It is against common rights, and the fact that a purchaser may get an estate of great value for a trifle has led the courts to deny the authority to sell except by close pursuit of the law that creates the authority. For these reasons, the authorities are uniform in requiring great precision and close adherence to the statutory plan. Usually, there are three parties interested in the enforcement of tax dues: the land owner, the purchaser, and the government. Their interests are not strictly harmonious. To preserve a just balance between these opposing forces requires that the rights of the three should be constantly kept in mind. The rule which seems to appeal most strongly to the judicial mind, in considering the relative rights of the interested parties, is the one which requires, on behalf of the owner of land, full and substantial compliance, by the taxing officer, with all provisions that are for his benefit. The procedure is somewhat complex and technical, but, being distinctly prescribed by statute, there is little excuse for departure therefrom. Every step, being adversary to the rights of the land owner, from the listing of

the lands to the execution and record of the tax deed, must be followed with substantial strictness. This includes the making up and preservation of the record, as well as the doing of the acts which result in the sale. The making of the record of the act done is made just as important and substantial as the act itself. This is so because it is made so by the legislature, and also because of the great hazard of allowing the proof of the taking of the various steps to rest in parol. It is a matter both of public and private interest that a man's property shall not be taken from him except in conformity to forms of law. When the legislature has marked out a plan, one step is just as essential as another, if the rights of the owner are affected thereby, and this, as already stated, includes the act and the record of the act. This court has recognized the binding force of this statement in a multitude of cases. We need only to turn to the books to find many decisions which, in letter and spirit, respond to the demands that taxing officers must adhere strictly to the commands of the statute.

Under the scheme mapped out by the legislature, the delinquent return is made to the county treasurer. He is charged with the duty of making the sale. Every step leading up to that event must be taken with the utmost care, and every requirement of the statute must be closely pursued. But his duties do not end with the sale. A record of his proceedings must be made up,—not merely for the benefit of the purchaser or those who may obtain interests in the land sold. This record is of the utmost importance to the owner. He has a right to demand strict compliance with all the forms of law before his property shall be taken from him, and it is the record so made that informs him and the public that such requirements have been met. The sale, however, does not divest him entirely of his interest in the land. The law wisely and justly gives him a period of redemption. The treasurer's duties end when the sale is made and his record thereof duly

filed. Sec. 1141 requires him, immediately after the close of the sale, to deposit, in the office of the county clerk, "all affidavits, notices and papers in relation to such sale," to be filed and preserved therein. If no record proof of the various steps is made, it is fatal to the sale, and parol proof cannot supply it. *Hebard v. Ashland Co.* 55 Wis. 145, 12 N. W. 437; *Hiles v. Cate,* 75 Wis. 91, 43 N. W. 802; *Iverslie v. Spaulding,* 32 Wis. 394.

But the statute makes a further requirement. It says that the treasurer shall also file, with the county clerk, "a statement containing a particular description of each tract or parcel thereof of land so sold by him, specifying the name of the person to whom sold, the amount for which the same was sold, and the name of the owner if known; and the said treasurer and clerk shall each record such statement in their respective offices." There can be but one possible purpose of requiring this statement to be recorded in the clerk's office. Upon him is thrust the duty of making out redemption receipts. To him the owner of the land applies when he desires to exercise his right of redemption. In his office search is made to ascertain if lands have been sold and the amount due for delinquent taxes. In most, if not all, counties a tax abstract is kept by the county clerk. That abstract can only be made from the statement received by him from the county treasurer. The opinion says that the filing of this statement with the county clerk "is only to a limited extent, if at all, for the benefit of the owner of the property," and the conclusion is "that the requirement that the statement be filed is directory, and not mandatory." If the statute is directory merely, then the treasurer may exercise his pleasure in filing it. He cannot be compelled to file it. If he fails to do so, I have been greatly at loss to discover how the clerk is ever going to be able to make up an authentic record in his office. I have an absolute right to redeem my lands after sale. The law requires me to make my application to the county clerk.

Sec. 1165. I go to his office, and am informed that he has no record of the sale. I have inspected the record in the treasurer's office as suggested in the opinion, and find my land has been duly sold. The officer charged with the duty of giving me the documents that clear my title of the lien of the tax is powerless to act. His right to act has no basis unless it be upon a record made up as the law requires. Sec. 1167 requires him to enter on the sales list kept by him, and which he can make up only from the statement filed with him by the treasurer, certain facts relative to the redemption. How is it possible for him to comply with the law in this regard if he has no such list? How can he make an authentic sales list if the statement mentioned by sec. 1141 is not filed? Is it true that these requirements are only to a limited extent for the benefit of the land owner? My idea is that it is immensely for his benefit, and that the requirement is one of the necessary steps in the general plan, which cannot be omitted without leading to unjust, not to say absurd, results.

In *Iverslie v. Spaulding,* 32 Wis. 394, this court held that the object of the provisions of sec. 1141 was to enable persons to ascertain whether the law had been complied with, and that the files and records are the only evidence which can be admitted to show the facts. In the case at bar, the trial court affirmatively found that the county treasurer did not, after the sale, file in the county clerk's office a list of the lands sold. Such finding leaves subsequent proceedings without any basis to rest upon. The statute is mandatory because it provides a vital link in the chain of tax proceedings. The land owner, more than any other, is interested in having the statute complied with. A failure to comply with it, in my judgment, vitiates subsequent proceedings, and renders the tax deed void.

BATAVIAN BANK, Respondent, vs. NORTH, Appellant.

May 13—June 19, 1902.

(1) *Evidence: Opinions: Court and jury.* (2, 3) *Duress.* (4) *Checks: Presentation: Agreement to postpone.*

1. Opinion evidence as to an ultimate fact, based on a correct theory of the underlying facts, met by like evidence upon a wrong theory of such minor facts, does not create a conflict for solution by a jury.
2. Duress of a person is that condition of such person's mind, caused by wrongful conduct on the part of another, rendering the former incompetent to contract by the exercise of his own free will.
3. Any amount of persuasion to influence one to exercise his own will to some particular end does not constitute duress.
4. If a person gives his check to another on condition that it shall not be presented to the drawee bank for payment till funds are produced in such bank by the payment of a check given to it by such person upon another bank, he impliedly agrees that the latter check shall be paid within a reasonable time, and if, by his connivance or consent, or otherwise, it is not so paid, such other may present his check for payment notwithstanding, and upon its dishonor sue to recover thereon.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action on a $5,600 check drawn on the Continental National Bank of Chicago, Illinois, April 14, and dated April 26, 1900, payable to Ray S. Reid or order, and, as alleged, delivered to him for value at the date thereof and thereafter indorsed by him for value to plaintiff and dishonored, payment being refused at the drawee bank because there were no funds there to meet the same.

The complaint stated the facts indicated and all others requisite to a cause of action in plaintiff's favor to recover on the check the amount thereof with interest and costs. Defendant answered, admitting the genuineness of the paper,

that the same was not drawn against funds in the drawee bank, that none were deposited there to meet the same, and that nothing had ever been paid thereon. The answer put in issue the allegation of the complaint as to ownership of the check by plaintiff, and pleaded, in addition, two defenses, viz., that payment of the check was expressly made conditional on precedent payment of a check for $10,000, drawn by defendant on the Bank of Hudson, Wisconsin, and deposited in the Continental National Bank for collection; and that it was fraudulently obtained from defendant. The following, in effect, are the facts alleged as to fraud:

Defendant's father died about 1890, leaving an estate valued at $200,000, consisting mostly of notes secured by farm mortgages, to defendant, H. L. North, her brother, and her mother, in equal proportions. Such proceedings were duly had in respect to the settlement of such estate that about 1893 the residue, after paying all claims other than those of legatees and devisees, was assigned by the probate court of St. Croix county, Wisconsin, undivided, to the three persons named. Mr. North immediately thereafter took charge of the entire property and managed the same till a division thereof was made as hereinafter set forth. Defendant was about twenty years of age when her father died. She was then wholly unacquainted with business matters and so continued down to and inclusive of the time of the giving of the check in suit. She permitted her brother, without objection till 1895, to handle the common property as he saw fit, paying no attention to the business whatever, he paying her from time to time, for her personal expenses, such sums as she required. In 1895 she expressed a wish to have the property divided and her share set off to her so that she could handle it herself if she desired. She was advised to such course by Mr. Reid, who was then a practicing lawyer at Hudson, the home of the North family, and who was the county judge of St. Croix county when the estate was probated. Mr. North

prevailed on defendant to abandon the idea of having the property divided and to permit him to continue to handle the estate as he had been doing since it was assigned. Thereafter he continued to manage the property till disturbed in that regard as hereinafter stated, paying the expenses of all the parties interested out of the common fund. In the spring of 1899, while defendant was staying with her cousin, Mrs. Salmon, in the city of Chicago, Mr. North stopped payment upon her checks—which were drawn upon the Bank of Hudson, of which he was president and through which the money belonging to the estate was handled—upon the ground that she was spending money imprudently, notifying her to that effect. She thereupon communicated with Mr. Reid, who was then practicing his profession in the city of La Crosse, sending to him Mr. North's letter and requesting an interview. In response to such request Mr. Reid called on her at Mrs. Salmon's, where a consultation was had, the latter taking an active part in advising defendant as to obtaining control of her property. Mr. Reid stated that a large amount of labor would be required to accomplish her desire, and that the cost thereof would be five per cent. upon the value of her property and $500 for expenses; that five per cent. and expenses was the usual charge for settling an estate and securing a division thereof among heirs. Such statement was untrue. Subsequently defendant met Mr. Reid in St. Paul, by his procurement, when, relying entirely upon the representations theretofore made as herein indicated, she authorized him to proceed to secure the possession of her property for her on the terms stated by him at Mrs. Salmon's. Shortly thereafter she repented and notified Mr. Reid not to proceed, whereupon he notified her that whether he did so or not he should insist upon the benefit of his contract. That influenced defendant to reluctantly allow him to go on as agreed. He thereafter fully performed his part of the contract, with the friendly cooperation of Mr. North, though the latter did not approve of

his sister's course. After the work was done, defendant gave Mr. Reid a certificate of deposit for $5,350, issued by the Bank of Hudson, and a check for $950 as compensation for his services. The check was paid. Before the certificate of deposit was presented for payment Mr. North discovered the particulars of his sister's settlement with Mr. Reid and advised her to take advice as to the reasonableness of his charges. She did so, and becoming satisfied that she had been deceived, that the amount of labor done by Mr. Reid was much less than he had represented, and that she had been charged a very exorbitant amount for his services, requested him to return the certificate of deposit and to make a bill to her for such reasonable charges as would fairly compensate him. He complied so far as to return the certificate of deposit, but he neglected or refused to render a bill for his services. Thereafter, in April, 1900, he met defendant at Mrs. Salmon's in Chicago, he going there for the purpose of obtaining a settlement of his claim. He had previously, in conversation with defendant's mother, said that unless his bill was settled he would bring a suit and make public the conduct of Mr. North as to his sister's property, which statement was communicated to defendant. At Mrs. Salmon's he stated to her that unless his claim was settled he would bring a suit which would disgrace Mr. North. Mrs. Salmon reported that to defendant. Both statements were made for the purpose of having them communicated to defendant and of coercing her into settling Mr. Reid's claim against her will. The result of the conference at Mrs. Salmon's was that defendant, while in such a condition of fear lest her brother and family be disgraced in the manner threatened by Mr. Reid that she was unable to exercise her free will, and believing the only way to prevent harm to her brother was to submit to Mr. Reid's demands, gave him the check in suit, it being then agreed, as before stated, that the check should not be presented to the drawee bank for payment till her check for $10,000, deposited in such bank for collection, should be paid.

On the trial the evidence was undisputed that plaintiff was the owner of the check and entitled to recover thereon unless defendant was entitled to prevail upon some defense thereto set up in her answer. All evidence of a conditional delivery of the check was excluded upon the ground that it tended to vary the terms of a written instrument. The court decided that the evidence on the charge of fraud was insufficient to warrant a finding in defendant's favor in respect thereto. Accordingly, on motion of counsel for plaintiff, the court directed a verdict in its favor, upon which judgment was rendered for plaintiff, and defendant appealed.

For the appellant there were briefs by *W. F. McNally* and *Baker & Haven,* attorneys, and oral argument by *Mr. McNally* and *Mr. Spencer Haven.*

For the respondent there was a brief by *Bleekman & Bloomingdale,* and oral argument by *Ray S. Reid* and *F. N. Bloomingdale.*

MARSHALL, J. The first proposition presented by counsel for appellant is that there was evidence to carry the case to the jury on the issue of whether the contract, to pay five per cent. of the amount of appellant's property recovered for her of Mr. North, her brother, and expenses, was void because of misrepresentations made by Mr. Reid in respect to the customary charges for services of the kind he contracted to render, upon the faith of which such contract was made. It is not necessary to decide that proposition, so we will not discuss at length the evidence upon which counsel relies to maintain it. Mr. Reid's evidence is very positive and clear that he made no misrepresentations; that he merely assented to suggestions made by Mrs. Salmon, a relative of appellant and her trusted adviser, as to what would be a reasonable compensation for such services as it was understood he would be required to perform. His evidence is corroborated by that of Mrs. Salmon and by some circumstances. There is evidence

to the contrary, but the preponderance of evidence, we are safe in saying, is decidedly against appellant's theory. So much does it preponderate that way, that if the case were to turn on a decision of the question involved, we could not easily reach a conclusion that a jury would be warranted in deciding that the charge of fraud is clearly and satisfactorily established.

If the contract as to the amount Mr. Reid was to receive for his services were successfully impeached for fraud, since he fully performed the same, rendering valuable services to appellant, he was entitled to a reasonable compensation therefor; and if the check in suit is not in excess thereof the verdict was properly directed, leaving out of view, for the time being, defenses which will be considered later. As we consider the evidence bearing on the value of the services, it is substantially all in favor of respondent, to the effect that the charges made were not excessive. True, there was evidence on the part of appellant, putting the value thereof at $600 to $1,000, but it was given on an entirely false theory—the theory that the services consisted merely of dividing between three and four hundred thousand dollars' worth of property of the character of that in question by separating one third thereof from the residue, the owner of such residue lending friendly assistance, no strictly legal services being required in the matter, and the time spent not exceeding about thirty days. That left entirely out of view the facts, which are undisputed, that the contract was made upon the theory that Mr. North might have to be dealt with as an adversary from beginning to end; that a resort to the courts for an accounting might be necessary, involving an examination of his administration of the property for many years; that he was known to be hostile to any division of the property; and that the amount of labor that would be required to investigate all his operations and to fully establish the rights of appellant might be incomparably greater than the labor of merely

dividing the property. The evidence also failed to give significance to the fact that Mr. North did not keep any books of account of his transactions; that he handled the undivided property as if it were all his own; that he changed the legal title to a large part thereof to his own name, so that it was impracticable for any one not learned in the law, and possessed of good business ability as well, to trace all that came to his hands from his father's estate in 1893, and the income thereof down to the time of the settlement, and determine with any reasonable degree of certainty the amount which justly belonged to appellant; that the situation was such that Mr. Reid, notwithstanding he had much special knowledge of the property as it existed in 1893, by reason of his having been then county judge of St. Croix county, where the estate was probated, was obliged to spend much of his time for months investigating North's transactions before being able to reach any satisfactory conclusion as to the amount which he should account for to appellant; and that he finally recovered for her some $37,000 more than appeared on the surface to him to be her share when he commenced his investigations. In that situation of the case the evidence given by appellant's witnesses as to the value of Reid's services cannot be regarded otherwise than worthless. The evidence on the other hand seems to have been based, quite fairly, on the proofs as to what Reid had reasonable ground to expect he would have to encounter when he took up appellant's business, the labor he actually performed, and the beneficial results to appellant.

The next proposition presented for consideration is that the check was obtained by duress, the means used to overcome appellant's will being threats, made by Reid to her mother and to Mrs. Salmon, to sue for a settlement of his claim and make public in the litigation conduct of Mr. North in the property matters which would tend to disgrace him, intending to have such threats communicated to appellant, and which were so communicated, and so terrorized her that in

the giving of the check she executed the will of Mr. Reid, or his and Mrs. Salmon's, not her own. We have searched the evidence in vain for some proof of duress that would warrant a finding in appellant's favor. The situation, by the undisputed evidence, as we view it, when the settlement was made, was that Reid had a claim against appellant which he had a right to insist upon having settled in some way. For about eight months he had been endeavoring to obtain a settlement. He had good reason to believe that Mr. North was hostile to him for thwarting the plan of keeping appellant's property in his name and making her such an allowance from time to time as in his judgment was necessary for her expenses, and that he was bent on preventing her from settling the disputed bill. She was twenty-nine years of age. She had become, during the previous year, familiar with the amount and value of her property. It exceeded in value $126,000. Mr. Reid believed that the conduct of Mr. North in handling her property was discreditable to him. She knew that, long before the time the threats are claimed to have been communicated to her. Reid had good reason to believe that a lawsuit between himself and appellant would be exceedingly unpleasant to her because of the publicity it would give to her brother's conduct. It was proper for him, for a legitimate purpose and under such conditions that it would not unduly influence her, to inform her that his knowledge of her brother's conduct would necessarily become public if he was forced into a lawsuit. He made no statement about the matter to her, not even when negotiating with her in the presence of Mrs. Salmon. What he said, of which complaint is made, was said to her mother and to her relative, Mrs. Salmon, both of whom, he had good reason to believe, would advise her according to their judgment. He sought no interview with her when she was not where she had the benefit of advice by some one who, he had good reason to believe, was capable of advising her intelligently, and in whom she in fact had the fullest

confidence. At the time of the settlement he met her at the home of Mrs. Salmon, who acted in her behalf in all that transpired. Appellant admitted that she made the settlement with deliberation, without much discussion or difficulty, and that nothing occurred to excite her; that Mrs. Salmon advised her in the matter; that when an agreement was reached Mrs. Salmon suggested a plan for the payment of the money, which was accepted; that Mrs. Salmon then produced some blank checks and that she, appellant, made them out and delivered the one in suit to Mr. Reid, taking a receipt from him evidencing the settlement. True, she said that the communications made to her, to the effect that if she did not settle the claim a suit would be brought against her which would result in disgracing her brother, influenced her to make the settlement and to give the check; but that does not prove nor tend to prove duress, in view of the fact that she considered the question of the settlement with the aid of her friend, Mrs. Salmon, and deliberately came to the conclusion which resulted in the giving of the check.

Any amount of persuasion to influence one to exercise his own will to some particular end does not constitute duress. There was an honest controversy which called for a settlement in some way. It was perfectly proper for Mr. Reid to exhaust all reasonable efforts to that end by means of friendly negotiations before resorting to a lawsuit. There was no attempt to obtain a settlement without appellant having the advice of a person competent to aid her in the matter, and nothing was said by Mr. Reid, directly or indirectly, to influence her to the conclusion which she reached, except what he believed and had good reason to believe was true. When the settlement was consummated she executed her own will, not his. Admit that the menace of a lawsuit and unpleasant notoriety as to matters concerning her affairs with her brother were producing causes of her conclusion, that does not constitute duress so long as such conclusion was in fact hers. It

merely shows that she judged, from the whole situation, that she had better settle the controversy. If that could be called duress there would be very little stability to settlements *inter partes.*

Duress of a person is that condition of his mind, caused by wrongful conduct of another, rendering him incompetent to contract by the exercise of his own free will. *Galusha v. Sherman,* 105 Wis. 263, 81 N. W. 495. There was no wrongful conduct of that kind in this case, as we have seen. The claim that there is evidence tending to establish duress is based largely on the theory that Mrs. Salmon acted in the interest of Mr. Reid while she pretended to guard the interests of appellant. We are unable to find any support for that in the record.

The last proposition advanced is that the evidence shows that the check was given, coupled with a verbal condition that it was not to be paid till the one given to the drawee bank, on the Bank of Hudson, was paid, and that, as the latter was not honored, the former never became an enforceable obligation; and that the trial court erred in excluding the evidence offered to prove such condition. As we view the case, if the evidence had been admitted and the condition and check had been taken together as parts of one entire contract or transaction, the result would have been the same. So it is not necessary to pass upon the question of whether the evidence was improperly excluded. If appellant gave the check in suit on condition that it would not be presented to the drawee bank for payment till the $10,000 check was paid, it was, necessarily, impliedly agreed that the condition precedent should be satisfied within a reasonable time. The evidence shows that, if she did not actively connive at the dishonor of the $10,000 check, that event was in perfect harmony with her wishes, that she made no effort whatever to have it paid. We cannot avoid the conclusion that she was a party to the failure of the condition, if one existed, by either directing the

Hudson bank not to pay the check, or sanctioning her brother's conduct in that regard. That obviously precluded her from rightfully insisting upon such failure as a defense. She clearly breached her implied contract in the matter, and cannot invoke her wrongful conduct as a defense. The moment the condition, if there was one, upon which the check in suit was given, failed by her connivance or consent, it became binding upon her, discharged thereof, and upon its dishonor for want of funds in the drawee bank to pay it she became liable thereon.

By the Court.—The judgment is affirmed.

SUTTON, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent,

May 14—June 19, 1902.

Dismissal for want of prosecution after new trial ordered: Waiver: Question of fact: Appealable orders.

1. **Defendant moved to dismiss the case because it had not been brought to trial within the year limited by sec. 3072, Stats. 1898. Plaintiff moved for an enlargement of such time. The affidavits of the respective parties were conflicting as to an alleged waiver by defendant. *Held*, that there was no error in adopting defendant's statement of the facts and dismissing the case.**
2. **Neither an order directing judgment of dismissal because the case has not been brought to trial within the year limited by sec. 3072, Stats. 1898, nor an order refusing to extend that time, is appealable.**

APPEAL from a judgment and orders of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Judgment affirmed; appeal from orders dismissed.*

A former judgment in this case was reversed upon appeal to this court, and a new trial ordered, on January 11, 1898.

98 Wis. 157, 73 N. W. 993. The costs were paid and the record remitted within sixty days thereafter. Shortly prior to the October, 1898, term of the circuit court for Monroe county, an interview took place between the plaintiff, acting as his own attorney, and the assistant solicitor for the defendant, the plaintiff's version of which might have justified an understanding that there was an agreement that the case should not be noticed or tried at that term. This version is contradicted and another given by Mr. Luse, the defendant's attorney, supported by memoranda, made at the time, entirely in conflict with this view. The case was not noticed at that term. About January 21, 1899, another interview took place, as to the substance of which the parties are also in direct conflict; the plaintiff claiming to have notified defendant's attorney of his purpose to notice and try the case at the then ensuing March term, and that the defendant's attorney substantially assented thereto. Defendant's attorney denies any such conversation, and asserts that all that took place was an attempt or offer to serve upon him a notice of trial, which he refused to accept, stating as a ground thereof certain conduct of the plaintiff which led him to refuse any admission or waivers. On March 21, 1899,—more than a year after the judgment of reversal in the supreme court,—the defendant moved, upon proper notice, to dismiss the case for the reason that it had not been brought to trial within the year required by sec. 3072, Stats. 1898. Plaintiff at the same time moved for an order extending and enlarging the time within which the action was required by law to be brought to trial. After hearing both motions the court entered an order denying plaintiff's motion, and ordering that the action and complaint be dismissed, and that judgment of dismissal be entered. Such judgment was entered, with costs, in favor of the defendant and against the plaintiff. The plaintiff appeals from that judgment, from the order of March 21st dismissing the

action, and from the order made the same day denying plaintiff's motion to enlarge time for bringing the action to trial.

For the appellant there were briefs by *J. J. Sutton, in pro. per.*, and *Paul D. Durant*, of counsel, and oral argument by *Mr. Durant.*

For the respondent there was a brief by *H. L. Humphrey* and *Nelson J. Wilcox*, attorneys, and *Pierce Butler*, of counsel, and oral argument by *L. K. Luse.*

DODGE, J. We need not discuss what acts by defendant might constitute waiver of its right to dismissal after expiration of the one year without trial, limited by sec. 3072, Stats. 1898, nor whether the circuit court has authority to extend that period. See *Christianson v. Pioneer F. Co.* 101 Wis. 343, 77 N. W. 174, 917; *State ex rel. Mitchell v. Johnson*, 105 Wis. 90, 80 N. W. 1104. It suffices to dispose of the present appeal that, upon the facts as set forth by defendant's affidavits, there could be predicated neither waiver on its part nor any error on the part of the circuit court in refusing to enlarge the statutory period. That state of facts was, at most, placed in conflict by plaintiff's affidavits, so that decision of the trial court thereon must control. In adopting such statement of facts, no error was committed. Neither the order directing judgment of dismissal, nor that refusing to extend time for trial, is appealable, for neither prevents a judgment. Stats. 1898, sec. 3069, subd. 1.

By the Court.— The appeals from orders are dismissed. The judgment of the circuit court is affirmed.

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SVENNES, Appellant, vs. VILLAGE OF WEST SALEM, Respondent.

May 14—June 19, 1902.

Statutes: Amendment: Clerical error in recital: Recording resolution taking land for drain.

1. **A statute (sec. 3187*a*, Stats. 1898) was amended by striking out certain words. A subsequent amendment was expressly limited to another portion of the section, but by inadvertence the words before stricken out were incorporated in the recital of the section as amended. *Held*, that such recital did not re-enact those words, but the clerical error should be disregarded.**
2. **The provision in sec. 3187*a*, Stats. 1898, as amended, that a resolution or order taking or affecting land for the purposes therein mentioned, without an application having been made therefor, shall have no effect unless it be "recorded," means recorded in the office of the register of deeds of the county in which the land is situated, as prescribed in another part of the section.**

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

For the appellant there were briefs by *Skaar & Bosshard*, and oral argument by *Otto Bosshard.*

Benj. F. Bryant, for the respondent.

CASSODAY, C. J. This is an action to restrain the defendant from constructing a drain upon the land of the plaintiff, described. The action was commenced, and the defendant obtained a temporary injunction, October 2, 1901. The defendant answered on the merits, and alleged, in effect, that it had acquired the right to construct the drain by such proceedings for the condemnation of the land as were required by secs. 895–902, ch. 40, Stats. 1898; that, among other things, it caused an accurate survey and plat of the proposed drain to be filed with the village clerk, and declared by resolution its purpose to take such land and construct and open such drain, and that it would apply to a justice of the peace

named, August 1, 1901, at 2 p. m., at his office, for the appointment of a jury to condemn such land; that due notice was given of such application; that a jury of twelve competent persons were selected and appointed at the time and place so named; that the jury so appointed were duly summoned and sworn to serve as such August 9, 1901; that such jury thereupon viewed the premises, and unanimously returned a verdict that it was necessary to take the lands described for the purpose of constructing and opening a drain, and found and appraised the damages to the plaintiff at $250, and that he received no benefits; that the plaintiff appealed therefrom to the circuit court, where the matter was still pending; that the defendant did thereupon enact an ordinance for opening the drain, and set apart $250, and made an order, lawfully executed, payable to the plaintiff, and deposited the same with the village clerk, subject to the order of the plaintiff; that all the acts complained of were done pursuant to the authority of such proceedings,—and prayed that such injunction be vacated, dissolved, and set aside. Upon such answer and corroborating affidavits, the defendant moved the court to vacate and dissolve such injunction.

On the hearing of the motion, it was made to appear, and is undisputed, that no notice of the pendency of any application for such condemnation, nor any plat or description of such premises, was ever filed in the office of the register of deeds; that no final order or resolution based upon such application, nor final order, judgment, or decree, or certified copy thereof, was ever recorded in the register's office; that no resolution or ordinance for the taking of such land, or affecting the same, certified or uncertified, was ever recorded in the register's office. Upon such hearing, the trial court, October 8, 1901, ordered that such injunction be, and the same was thereby, vacated. From that order the plaintiff appeals.

The defendant contends, and the plaintiff concedes, that in the condemnation proceedings the defendant complied with all

the requirements of secs. 895–902, Stats. 1898. The plaintiff contends that such proceedings were incomplete, insufficient, and void as to the plaintiff, and vested no title to the land in the defendant, by reason of the failure to comply with sec. 3187*a*, Stats. 1898, as amended. The most of that section relates to condemnation proceedings upon application made, and provides for the filing and recording of certain papers in the register's office, which the undisputed evidence shows were not filed nor recorded in that office in the case at bar. That part of the section provides that the "neglect to comply with" such provisions should "render all proceedings based upon such application void." The defendant concedes that "there was no application made in this case," and that the village board proceeded "on its own motion," and that "the inquiry on this appeal is narrowed down to a construction of the last sentence of sec. 3187*a*." That sentence of that section, as it appears in the Statutes of 1898, reads:

"A (certified copy of any) resolution or order made by any such body, whereby any land shall be taken or affected *without an application* having been made therefor, shall have *no effect* and shall not be notice to any subsequent purchaser or incumbrancer, unless such resolution or order be recorded."

The words "certified copy of any," in the first line of the sentence, and above in parenthesis, were stricken out by sec. 38, ch. 351, Laws of 1899. That left the sentence as though the words so stricken out had never been incorporated. Two years afterwards that section was again "amended by striking out the words 'or town board,' in the third line of said section, and by inserting the word 'or' before the words 'village board' next preceding, so that said section when amended shall read as follows." Ch. 121, Laws of 1901. Such recital was in compliance with Joint Rule No. 12 of the senate and assembly, which required that "every bill shall recite at length every section which it proposes to amend, as such section will read if amended as proposed."

The question recurs whether such mere recital had the effect to re-enact the four words so expressly stricken out two years before. Such amendment by its terms was expressly limited to the third line of the section, whereas the sentence in question commenced in the sixteenth line of the section. There was manifestly no intention of changing the last sentence of the section in any manner. By inadvertence, there was a failure to recognize the fact that the four words mentioned had been stricken out two years before. This court has repeatedly held that such "a mistake or omission in such recital will not defeat the intention of the legislature." *Custin v. Viroqua,* 67 Wis. 314, 30 N. W. 515; *State v. Stillman,* 81 Wis. 124, 51 N. W. 260. Such clerical error in the recital of the section as amended must therefore "be disregarded, and effect given only to the amendment specified." *Id.* Omitting the words so stricken out, the sentence declares, in effect, that such "resolution or order . . . shall have no effect . . . unless . . . recorded." There is no room for a different construction. The contention that only a " certified copy " of such resolution or order is to have no effect unless recorded, and that the original resolution or order remained in full force, must be overruled.

The suggestion that the section fails to state where such resolution or order was to be recorded—"whether in the records of the village, or in the office of the register of deeds, or elsewhere"—is without foundation. The object of such recording is to perfect the title to the land so condemned, not only between the parties, but as against "any subsequent purchaser or incumbrancer." The requirement that the resolution or order "be recorded," therefore, manifestly means to "be recorded in the office of the register of deeds of the county in which the land is situated," as prescribed in the former part of the section.

We must hold that such proceeding to condemn the land was not complete, by reason of the failure to record such reso-

lution or order, and that such recording, as well as the other steps taken, was a condition precedent to the right of the defendant to enter upon the land and construct the drain.

By the Court.—The order of the circuit court vacating the preliminary injunction is reversed, and the cause is remanded with direction to deny the defendant's motion to dissolve such injunction, and for further proceedings according to law.

HESSER-MILTON-RENAHAN COAL COMPANY, Appellant, vs. LA CROSSE FUEL COMPANY, Respondent.

May 14—June 19, 1902.

Contracts: Construction: Acquired meaning of words: Trade usage: Evidence: Bill of particulars.

1. A contract made by letters and telegrams between wholesale coal dealers and a retailer is construed to be an absolute contract to deliver as much as two car loads of coal per week, subject only to strikes, and a scarcity of cars is *held* to constitute no excuse for a breach.
2. The words "subject to strikes," in a written contract to deliver coal, may be shown by parol evidence to have acquired, by general usage in the coal trade, a definite meaning which would include a strike limited to the vendor's mines, as well as a general strike in all mines.
3. A bill of particulars served in response to a demand, but not identified or verified as correct by any witness, does not constitute affirmative proof of any fact, as against the opposite party.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action to recover a balance of $502.21 due for coal furnished and delivered to defendant between July 1, 1899, and March 31, 1900. The coal was sold and delivered by the firm of Hesser & Milton, who were wholesale coal dealers at Cincinnati, and operated mines in the New River

district in West Virginia on the line of the Chesapeake & Ohio Railway. June 1, 1900, the plaintiff corporation was formed by Hesser and Milton, and all the firm assets, including the claim sued on, were transferred to the corporation. The defendant is a domestic corporation engaged in the retail coal business at La Crosse. The defendant, by answer, admitted the plaintiff's claim, but pleaded a counterclaim, by which it was alleged that on or about September 29, 1899, it contracted with the city of La Crosse to furnish said city during the ensuing year 3,000 tons of "mine run" coal, to be used at the city pumping station, and 500 tons of prepared coal, to be used in the city schools; and that on or about the same date, Hesser & Milton contracted to furnish defendant the coal to fill said contracts at certain prices, and to deliver the same from time to time as required; that Hesser & Milton failed to furnish said coal as required, and that defendant, in order to fulfill its said contracts, was obliged to buy coal elsewhere, and to expend in such purchases more than $1,000 in excess of the prices agreed upon in the contract with Hesser & Milton, for which sum, as well as for loss of profits, judgment was demanded. The plaintiff, by reply, admitted that Hesser & Milton contracted to furnish defendant a season's supply of coal, running to May 1, 1900, at certain prices, but denied that the contract was for any specific quantity, or that it guarantied delivery, but that the contract was made subject to strikes and other causes beyond their control, and that the failure to deliver as fast as ordered was due to impossibility of obtaining cars, and to a strike in their mines running from March 28 to April 21, 1900.

The action was tried by a jury, the defendant having the affirmative of the issue. The contract was made entirely by correspondence. A number of letters passed between the parties in August, 1899, by which it appears that the defendant informed Hesser & Milton of the city coal contracts aggregating about 3,000 tons, which would soon be let, and

of its desire to bid on the same and, if it secured the contracts, to fill them with Hesser & Milton coal. In this correspondence Hesser & Milton finally offered to protect a contract for 3,000 tons with the city for "mine run" coal for the year ending October 31, 1900, on basis of $3.60 per ton f. o. b. at La Crosse, till October 31, 1900, stipulating, however, that they did not guaranty the existing freight rate (which was $2.85 per ton), but that the defendant must see to that; thus making their guaranty 75 cents per ton at the mines. Following this correspondence, the defendant sent to Hesser & Milton the following telegram September 29, 1899: "Please hurry forward coal ordered. Bids for city supply open tomorrow. Can we guaranty shipments two cars per week for year mine run?" To this telegram Hesser & Milton replied on same day: "Will guaranty price of eighty cents at mines, and supply subject to strikes. You will have to see Northwestern for protection of freight rates." On the 6th of October following, the defendant contracted with the city to furnish 2,500 tons, more or less, of "mine run" coal for the year ending October 1, 1900, at $4.40 per ton, and also to furnish 500 tons of prepared coal for the schools at $5.40 per ton, and on the same day wrote Hesser & Milton as follows:

"Gentlemen: I have secured the contract for city pump works. Your wire 29th makes price 80 cents at mines for mine run. I understood from former correspondence that price would be 75 cents for mine run for year, and I based on this. Please advise if I am not correct. On this order I wish you would ship at earliest possible time ten cars mine run, and follow with two cars per week until further advised."

To this letter Hesser & Milton replied October 17, 1899, explaining why they felt compelled to ask 80 cents at the mines instead of 75 cents, and saying:

"We fully expect to protect you right up to the handle, as agreed, on this contract, and we will have to ask you to be entirely fair with us on shipments of mine run made you between now and May 1st, which will be delivered at the city pump works."

To this letter defendant replied October 19, 1899, as follows:

"Gentlemen: Your favor of the 17th at hand and noted. Your position taken on the city waterworks is all right. The summer price on coal is usually lower than during the winter months, therefore thought that there would be no objection to extend same to October. We will let it stand at 80c. for the pump works. The ten cars run of mine ordered the 6th, with two cars a week to follow, is for the city, and on this it is understood the price will be 80c."

On October 20, 1899, Hesser & Milton replied as follows:

"Beg to acknowledge receipt of your favor of the 19th inst. We are very glad, indeed, that you take a proper grasp of the situation. We note your prices on mine run, and will go ahead on shipments on basis of 80 cents per ton at the mines, which we take it will be entirely satisfactory."

It further appears that Hesser & Milton failed to ship coal as agreed on account of an alleged scarcity of cars, and much correspondence took place between the parties on the subject, the defendant urging that shipments must be made, and Hesser & Milton excusing the delay on account of inability to obtain cars. As the season progressed, the defendant, in order to fulfill its contract with the city for "mine run" coal for the pump works, was obliged to purchase of outside parties 1,682 tons at various times, upon which it was obliged to pay in excess of the price agreed to be paid to Hesser & Milton the sum of $1,009.80. It does not appear, however, when this excess was incurred or paid, but simply that this was the total amount of excess during the year. A strike occurred in Hesser & Milton's mines March 28, 1900, and continued till April 21st, during which time no coal could be mined or shipped. There were other mines in the New River district from which the same quality of coal could have been obtained.

The defendant waived any claim for an affirmative judgment for damages, and moved for a verdict in its favor, which was granted, and from judgment thereon the plaintiff appealed.

For the appellant the cause was submitted on the brief of *Mills Tourtellotte.*

George H. Gordon, for the respondent.

WINSLOW, J. The claims of the appellant which are necessary to be considered are: (1) That the contract which appears in the letters and telegrams was not an absolute contract to ship two car loads of coal per week, but only a contract to do their best in the usual course of business to fill orders, and that, if Hesser & Milton were prevented from shipping coal as ordered by reason of scarcity of cars or other cause beyond their control, there was no breach of the contract; (2) that the words "subject to strikes" in the telegram of September 29th were so far of an ambiguous or uncertain nature that parol evidence should have been received showing their generally accepted meaning in the coal trade.

1. As to the proper construction to be placed upon the contract, we think that the trial court was entirely right in construing it as an absolute contract to deliver as much as two car loads per week during the year "subject to strikes," and that the fact of a scarcity of cars constituted no excuse for the breach of the contract, no such exception to the absolute character of the undertaking having been embodied in the letters or telegrams. The material part of the letters and telegrams will be found set forth in the statement of facts, and it does not seem necessary to repeat them here, nor to do anything more than state our conclusions on the subject.

2. It is elementary law that the construction of written contracts whose words are plain is the proper function of the court, but, if words or phrases are used therein which are technical, or have gained a definite and peculiar meaning in a certain trade by general usage, extrinsic evidence may be received, showing that such meaning has been acquired, and what it is. 2 Jones, Ev. §§ 461, 462. The words "subject to strikes" cannot be said to be entirely definite in their

meaning. There may be a general strike in all the mines in the country, or there may be a strike confined to the plaintiff's mines alone, or to the mines in a certain district alone; or there may be a strike upon the railroad lines interrupting all traffic. Any of the strikes supposed might seriously interfere with the carrying out of the contract to deliver coal. It is evident that, if the words here used were intended to refer to a general strike in all the coal mines of the country or in all the mines of the New River district, the plaintiff showed nothing in the way of a defense to the counterclaim; but if the words, by general usage and custom among coal dealers, meant a strike in Hesser & Milton's own mines alone, then the undisputed fact that there was a strike in their mines for nearly a month in March and April, 1900, would operate as a defense to the counterclaim so far as it is based upon any default occurring during that time. The appellant called witnesses who were experienced in the coal trade, and attempted to show by them the construction which the words "subject to strikes" had acquired by general usage and custom in the coal trade, and the evidence was excluded. The purpose of the evidence so offered was evidently to show that the clause was satisfied by the happening of a strike in the mines of Hesser & Milton. We think, under the principles before stated, that this ruling was erroneous.

It is said, however, by respondent, that this ruling was not prejudicial, even if it was erroneous, because it is said that it appears in the case that the defendant was compelled to expend, in order to fill the pump-house contract, more than $500 in excess of the contract price before the happening of the strike in Hesser & Milton's mines. If this fact did appear, it would doubtless be a complete answer to the claim of prejudicial error; but a very critical review of the bill of exceptions shows that it does not appear. The only evidence on the question is the bare statement that defendant purchased from outside parties, to fill the pump-house contract,

1,682 tons, and that this amount cost $1,009.80 in excess of the Hesser & Milton contract price. For aught that appears in the evidence, a large part or all of the excess may have been incurred for coal bought during the continuance of the strike, and, if so, then the evidence showing the meaning of the words "subject to strikes" would be manifestly very important. It is true there is a bill of particulars in the record served by the defendant in response to a demand, which purports to give dates, and prices paid for the coal so purchased, but it is not identified or verified as correct by any witness, and hence constitutes no affirmative proof of any fact as against the plaintiff.

In this state of the case it cannot be held that the ruling out of the proposed evidence as to the meaning of the strike clause was not prejudicial.

By the Court.—Judgment reversed, and action remanded for a new trial.

TOWN OF SHELBY, Respondent, vs. MILLER, Appellant.

May 14—June 19, 1902.

Contracts: Public policy: Agreement by individual to save town harmless from costs of litigation: Highways.

Defendant's application to the town supervisors to lay out a highway to his lands was granted, but an action was brought to restrain the opening of the road. The supervisors decided not to defend, but at defendant's request permitted him to defend in their place, he agreeing to save the town harmless from all costs and expenses of the litigation. *Held*, that such agreement was against public policy, and that, on being compelled to pay the costs, the town could not recover the same from the defendant.

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

Action on contract. The allegations of the complaint are to the following effect: September 13, 1899, defendant duly applied to the supervisors of the plaintiff town, under sec. 1275, Stats. 1898, to lay out a public highway to lands owned by him. Such proceedings were duly taken pursuant thereto that the application was granted October 23, 1899. Subsequently William Baier commenced an action in the circuit court for La Crosse county, against said supervisors as such, to enjoin the opening of the road, and temporary restraint in that regard was granted till the final termination of the litigation. Upon due consideration the supervisors decided not to defend the action. Defendant then requested them to permit him to defend the same in their place, promising to save the town harmless from all costs and expenses which might be directly or indirectly incurred by the town by reason of the litigation. The request was granted upon the terms stated. The result was that judgment was rendered in favor of Baier and against the supervisors for $125.70 in the circuit court, and $152.17 in the supreme court. Plaintiff paid both such judgments. Subsequently, at a regular meeting of the electors of the town, the action of the supervisors was ratified and they were authorized to commence an action against defendant for reimbursement of the outlay aforesaid. After such outlay a demand was duly made upon defendant to comply with his agreement by making the town good for the same, which he refused to do.

Judgment was demanded for the amount of the outlay with interest and costs. The defendant demurred to the complaint for insufficiency. The demurrer was overruled and defendant appealed.

The cause was submitted for the appellant on the brief of *Higbee & Bunge,* and for the respondent on that of *McConnell & Schweitzer.*

To the point that the contract was against public policy and void because it was for the control of the official action

and decision of plaintiff's supervisors, counsel for appellant cited *Adams Co. v. Hunter* (Iowa) 6 L. R. A. 615; *Williams v. Segur,* 106 Ind. 368, 1 N. E. 707; *Morris v. Hoff,* 3 N. J. Law, 463; *Dorset v. Garrard,* 85 Ga. 734, 11 S. E. 768; *Hatch v. Mann,* 15 Wend. 44; *Kennedy v. Hodges,* 97 Ga. 753, 25 S. E. 493; *Buck v. Eureka* (Cal.) 30 L. R. A. 409; *Cole v. Parker,* 7 Iowa, 167; *Cass Co. v. Beck,* 76 Iowa, 487, 41 N. W. 200; Greenhood, Public Policy, 337; *Ramsey Estate v. Whitbeck,* 183 Ill. 550, 56 N. E. 322; *New Haven v. N. H. & D. R. Co.* (Conn.) 18 L. R. A. 256; *Ayres v. Moan* (Neb.) 15 L. R. A. 501; *Hope v. Linden P. Asso.* 58 N. J. Law, 627, 34 Atl. 1070; *Foley v. Platt,* 105 Mich. 635, 63 N. W. 520; *Penley v. Auburn,* 85 Me. 278, 27 Atl. 158; *Ring v. Devlin,* 68 Wis. 384; *Richardson v. Crandall,* 48 N. Y. 348; *Fawcett v. Eberly,* 58 Iowa 544, 12 N. W. 580; *Brule Co. v. King,* 11 S. D. 294, 77 N. W. 107.

Counsel for the respondent cited *Printing & N. R. Co. v. Sampson,* L. R. 19 Eq. 462; *Houlton v. Nichol,* 93 Wis. 398; Bishop, Contracts, § 995; *Clark v. Janesville,* 13 Wis. 414; *State ex rel. Curtis v. Geneva,* 107 Wis. 1; *Townsend v. Hoyle,* 20 Conn. 1; *Goodspeed v. Fuller,* 46 Me. 141; *Industry v. Starks,* 65 Me. 167.

MARSHALL, J. As indicated in the statement, the supervisors, by the contract sought to be enforced in this action, abdicated their official positions as guardians of the public welfare in respect to the suit commenced by Baier. They officially considered the question of whether they ought, under the circumstances, to jeopardize the interests of the town by defending the suit, and determined it in the negative; then, in effect, for the consideration in controversy they allowed appellant to prolong the litigation in their official names. If this case could be determined on its mere moral aspects, the conduct of appellant, in obtaining full benefit of his agreement and then repudiating its responsibilities because not en-

forceable by legal remedies, would merit and receive condemnation by holding him liable upon the facts stated in the complaint upon the doctrine of estoppel *in pais.* But that wise public policy which abhors bartering away official discretion seems to shut the judicial door to respondent's plea for redress.

It has been decided by this and other courts that private contracts with officials, by which they surrender the performance of official duty to others, or allow the judgment of others to be substituted for their own in the performance of such duty, are void on grounds of public policy; that courts cannot be resorted to for the purpose of enforcing them. *State ex rel. Curtis v. Town Board of Geneva,* 107 Wis. 1, 82 N. W. 550, relied on by respondent, as we understand the opinion, very clearly condemns the agreement sued on. True, as there decided, town officers may accept private aid for the town in the making of a public improvement without vitiating their proceedings in determining whether the public interests require the improvement or not, if such aid is not the producing cause of their decision. This language was used in the opinion:

"Of course, such contribution or offer of pecuniary aid must not be of such a character, nor made under such circumstances, as would be likely to swerve the commissioners or town board from the performance of their duty to the public. Here, as indicated, it is expressly found that the decision was not procured nor induced by the undertaking, nor by any promise of pecuniary or other aid."

In the case before us it is alleged in unmistakable language that the action of the supervisors, in permitting the litigation with Baier to proceed, was based solely on appellant's agreement that he would defend the suit in their official names, but treat the matter involved as really his private affair and reimburse the town for all costs and expenses it might be subjected to because of the continuance of the litigation. Now it is plain that it was the duty of the supervisors to stand

for the town in fact as well as in form; that, regardless of whether the arrangement with appellant was free from moral turpitude or not, it required him to carry a burden in his private capacity as a condition of their permitting the suit to be defended, when they should have defended it unconditionally if, in their judgment, the public interest called for a defense in the matter, and, if it did not, should have stood by their resolution not to put in any defense. They were guilty either of extorting from Miller the agreement set forth in the complaint as a condition of the performance of their official duty, or of permitting a mere private person, in consideration thereof, to use their official positions to vex Baier with a long and expensive judicial controversy in which they did not believe there was sufficient merit on the side of the town to warrant them in carrying it on. In either view of the matter, sound public policy condemns the agreement. The rule in that regard is aimed at preventing that species of oppression which compels individual members of a community to obtain performance of official duty by purchase, as well as at preventing surrender of that official discretion which the law contemplates shall be bestowed upon every situation in which an officer is required to act. *Winter v. Kinney,* 1 N. Y. 365; *Webb v. Albertson,* 4 Barb. 51.

Much time might be spent reviewing the authorities supporting the principle of this decision without pointing to any case similar to the one before us, in all respects, as to the facts. We do not deem it necessary or advisable to discuss the subject at length, inasmuch as the principle involved is elementary and the precise standard of public policy to be maintained rests largely in judicial discretion where the legislature has not spoken on the subject. It is considered that capacity of a person to make an enforceable private contract with an officer to secure performance or omission to perform an official duty, whether benefit under such contract inures to such person or to the public and whether his motive in the

matter be good or bad, is inconsistent with a safe standard of official integrity; that such a contract is constructively corrupt; that it is void as contravening sound public policy, and not enforceable by judicial remedies. It follows that the demurrer to the complaint should have been sustained, and that the order appealed from must be reversed and the cause remanded for further proceedings according to law.

By the Court.—So ordered.

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2. To sustain a conviction for adultery it is sufficient that the adulterous disposition be shown to exist between the parties, and that they were together in equivocal circumstances, such as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt beyond a reasonable doubt. *Ibid*

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1. An order, under sec. 2942, Stats. 1898, requiring security for costs, is not appealable. *Cullen v. Hanisch*, 24
2. An order striking a cause from the calendar, based upon the ground that no such action is pending in the court, is, in effect, a ruling that the court has no jurisdiction, and is appealable. *Ashland v. Whitcomb*, 99
3. In a taxpayer's action to restrain payment by a county of a claim alleged to be void, defendants' answer contained a demurrer to the complaint for insufficiency, and also allegations justifying the allowance of the claim. A temporary injunction having issued, on the cause being regularly called for trial, the court dissolved the injunction and dismissed the action for want of equity, the whole controversy submitted to the trial court being made to turn on the questions raised by the demurrer. *Held*, that whatever irregularities existed in interposing the demurrer or in the disposition thereof by said order were waived, and, it being in effect an order denying a temporary injunction and sustaining a demurrer, the order was appealable under subd. 3, sec. 3069, Stats. 1898. *Quayle v. Bayfield Co.* 108
4. An order denying the petition of a private citizen for the removal of the clerk of a circuit court on the ground of malfeasance does not affect any substantial right of the petitioner, and is not appealable under subd. 2, sec. 3069, Stats. 1898. *In re Aldrich*, 308

[5. Whether a proceeding under sec. 973, Stats. 1898, for the removal of the clerk of a circuit court is a proceeding in court, to which the general statute regulating appeals from orders made by the court is applicable, doubted.] *Ibid.*

6. An order confirming the report of the referee appointed, after the dismissal of an action, to ascertain the damages sustained by reason of an injunction, is a "final order affecting a substantial right made in special proceedings," and is appealable under subd. 2, sec. 3069, Stats. 1898. *Wis. M. & F. Ins. Co. Bank v. Durner,* 369

7. An order directing the receiver of an insolvent banking partnership, appointed by the state court, to turn over all the property to a trustee in bankruptcy is *held* to have been a final order affecting a substantial right made in a special proceeding, and, unless a proper exercise of discretion, was appealable under subd. 2, sec. 3069, Stats. 1898. *State by Att'y Gen. v. German Exch. Bank,* 436

8. An appeal from a mere discretionary order will be dismissed if there was no abuse of discretion. *Ibid.*

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11. Unless it appears by the certificate of the clerk that the return on appeal from an order of the court contains the papers used by each party on the application therefor, as provided by sec. 3050, Stats. 1898, the appeal will be dismissed. *Madden v. Kinney,* 528

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13. On appeal from an order striking a cause from the calendar on the ground that it had been removed into a federal court, the order specifically recited that it was based on the *files and records.* The record was certified to be all the original files in the action, and there was no bill of exceptions. There was no paper in the record showing or tending to show that the federal court had assumed jurisdiction of the action. *Held:*

(1) The record affirmatively excluded the possibility of any other fact having been before the court than the facts appearing in the *files and records.*

(2) The mere recitation, at the close of the order, that the reason for granting the motion was, that the action had been removed to the federal court and that that court had assumed jurisdiction and retained said action, cannot be considered as proof of such fact, in the face of the direct statement that the order was based upon written records alone, which contain no proof thereof. *Ibid.*

14. *It would seem* that had the fact that the federal court had assumed jurisdiction been recited as a fact proven on the hearing of the motion, such recitation would be conclusive. *Ibid.*

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15. In the make-up of a bill of exceptions, it appeared that a medical expert, who had been examined upon a hypothetical state of facts and expressed his opinion, closed his answer to an objected question by saying, "It should have been done." Some lines further on, after speaking of other subjects, he was made to say, in testimony written out in narrative form, "I think, beyond a doubt, the evidence points to" the condition at issue. *Held*, that such conclusion could not have been given in response to the objected question, but in response to another question not preserved in the record, and to which no objection appeared to have been made. *Allen v. Voje*, 1

16. In such case, the question would not be erroneous unless the answer was responsive to the question, and if nonresponsive, counsel, in order to save an objection, should move to strike it out. *Ibid.*

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17. The refusal of the trial court to direct a verdict is reviewable in the appellate court if proper exception was taken and preserved in the bill of exceptions, although there was no motion for a new trial. *Reed v. Madison*, 85 Wis. 667, limited. *Lawless v. State*, 189

18. Same point. *Zahn v. M. & S. R. Co.* 38

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19. Where facts established at the trial, but erroneously omitted from the findings, entitle plaintiff to judgment as a matter of law, the appellate court may, on appeal from a judgment for defendants, consider such facts and direct a judgment accordingly, in order to prevent great injustice, even though there was no exception to the omission of the trial court to find such facts. *Grunert v. Speich*, 355

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20. An exception to the whole charge to the jury on the ground that it assumes the existence of facts in dispute, without specifying any particulars, is too general to receive consideration. *Lee v. Hammond*, 550

21. An exception to the refusal to give a requested instruction without modification is not available unless taken at the trial, the right to except after the trial being confined by sec. 2869, Stats. 1898, to the charge itself. *Gutzman v. Clancy*, 589

22. Exceptions to instructions upon the ground that they are contrary to law and the evidence do not raise the question of the propriety of giving them to the jury generally, without indicating their applicability to the questions of the special verdict. *Ibid.*

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25. Assignments of error not argued by appellant will not ordinarily be considered. *Nix v. C. Reiss Coal Co.* 493

Affirmance and reversal: Material and immaterial errors. See CRIMINAL LAW, 2, 7–9. DEPOSITIONS, 2. HUSBAND AND WIFE, 3. LANDLORD AND TENANT, 2. MASTER AND SERVANT, 13. PLEADING, 7. TRIAL, 2, 3, 5, 8–15, 20–22. WITNESSES, 6, 10.

26. Errors in the reception or rejection of evidence in an equity case are not deemed prejudicial in the absence of reasonable ground to believe that if the improper evidence had not been considered, and the proper evidence rejected had been admitted and given due weight, the result might probably have been different. *Herman v. Schlesinger,* 382

New trial after reversal: Failure to prosecute.

27. Defendant moved to dismiss the case because it had not been brought to trial within the year limited by sec. 3072, Stats. 1898. Plaintiff moved for an enlargement of such time. The affidavits of the respective parties were conflicting as to an alleged waiver by defendant. *Held,* that there was no error in adopting defendant's statement of the facts and dismissing the case. *Sutton v. C., St. P., M. & O. R. Co.* 647

Appeal from justices' courts. See JUSTICES' COURTS, 2.

APPEALABLE ORDERS. See APPEAL, 1–9.

APPROPRIATIONS: Public purposes. See CONSTITUTIONAL LAW, 8.

ARGUMENTS to jury. See TRIAL, 1–5.

ARREST AND BAIL. See EXECUTION.

ASSAULT AND BATTERY.

Civil liability. See PLEADING, 3.

1. In the course of a continuous encounter, one party at one time and his opponent at another may be guilty of assault, so that each may be entitled to recover damages from the other. *Gutzman v. Clancy,* 589

2. In an action for assault and battery it was not error to admit evidence as to the degree and duration of plaintiff's disablement, to show the extent of his injuries for which general damages were claimed, where the jury were instructed not to allow any damages for loss of time because not pleaded. *Ibid.*

Criminal prosecution. See CRIMINAL LAW, 1.

3. Defendant was accused of throwing his wife into a well about fifteen rods distant from his house, and sought to show that he was in the house at the time in question. There was evidence that all the family except defendant had gone to bed, and tending to show that all other persons who had been in the saloon in the lower part of the house had left. A servant testified that from her room she had heard defendant bring an intoxicated man upstairs and put him to bed, recognizing defendant by his voice. *Held,* that her further testimony as to the sounds she heard of his steps in passing downstairs, the clinking of glasses, the winding of the clock, and finally the arrival

of the persons who had heard the outcry of the wife in the well, should not have been excluded on the ground that it was not certain that there was no one other than defendant in the rooms below, but that question should have been left to the jury. *Goodwin v. State*, 318

4. After the wife had been rescued from the well her brother, in effect, charged defendant with putting her there, and he replied in substance that she could not prove it, or that he would give her brother a chance to prove it. *Held*, that this was not an admission of guilt or of any fact, and that a charge to the jury conveying to them the impression that it might be so construed was erroneous. *Ibid.*

ASSESSMENT of benefits. See MUNICIPAL CORPORATIONS, 3.

ASSESSMENTS on stock. See CORPORATIONS, 2, 3.

ASSIGNMENT of cause of action. See EXECUTORS, 1, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See WITNESSES, 1.

1. An assignee or creditor who wishes to file objections or to attack any claim on file, after the time limited by sec. 1699, Stats. 1898, can do so only upon application to the court, upon notice to the claimant, a *prima facie* showing of merits, and some reasonable excuse of the default; in which case the court will exercise a reasonable discretion in furtherance of justice. *In re Plankinton Bank*, 582

2. The fact that one assignee has resigned and a new one been appointed does not authorize the latter to reopen the proceedings so as to attack an admitted claim, otherwise than by permission of the court upon notice and good cause shown. *Ibid.*

ASSUMPTION OF RISK. See MASTER AND SERVANT, 4.

ATTORNEY AND CLIENT.

See EXECUTORS, 3. LIENS. MUNICIPAL CORPORATIONS, 1. WITNESSES, 1–5.

In an action by an attorney to recover for services, where defendant denied liability and alleged payment, the evidence (stated in the opinion) is *held* to justify a finding for defendant. *Smith v. Norton*, 458

ATTORNEYS' ARGUMENTS to jury. See TRIAL, 1–5.

ATTORNEYS' FEES. See INJUNCTION, 4.

BAIL. See EXECUTION.

BANKRUPTCY.

See APPEAL, 7. COMPROMISE AND SETTLEMENT.

1. After the appointment of a receiver in an action by the attorney general to wind up the business of a banking partnership, the partners were adjudged bankrupts in the federal court. On motion of the trustee in bankruptcy the state court ordered that all the property be turned over by the receiver to such trustee. The superior jurisdiction of the federal court over the property was conceded by all parties, and the order was so framed that any legal claim of the receiver to compensation for

his services and expenses followed the property into the hands of the trustee as a lien thereon. *Held*, that it was not an abuse of discretion so to protect the receiver's rights, instead of adjusting his account and ordering payment out of the funds in his hands before relinquishment thereof to the trustee in bankruptcy. *State by Att'y Gen. v. German Exch. Bank*, 436

[2. Whether the bankruptcy proceeding entirely superseded the jurisdiction of the state court, leaving the latter no authority in the matter other than to order the property turned over to the trustee, not determined.] *Ibid.*

BANKS AND BANKING. See BILLS AND NOTES.

BASTARDY.

See WITNESSES, 9, 10.

1. A judgment in bastardy proceedings which does not adjudge the present payment of any sum to the mother of the child cannot be docketed so as to become a lien in her favor upon land of the defendant. *Barry v. Niessen*, 256

2. Where the judgment in bastardy proceedings directs that defendant pay to the mother a certain sum per year for the support of the child, but does not direct payment in advance, such sum becomes due only at the end of each year's support. *Ibid.*

BILL OF EXCEPTIONS. See APPEAL, 15, 17, 18.

BILL OF PARTICULARS. See EVIDENCE, 1.

BILLS AND NOTES.

See FORGERY.

1. One who was indebted to a bank both upon a note and upon an overdraft gave, as collateral security for such debt or to secure future advances, another note due in five years, secured by mortgage for an amount less than the overdraft. This note was not at the time carried to his credit in the account. Afterwards he gave another note, which was carried to his credit, reducing the overdraft. As these notes, other than the mortgage note, became due, they were renewed from time to time, the debtor giving new notes, which would be placed to his credit in the account, and giving checks for the amounts of the old notes, which the bank would thereupon stamp "Paid" and surrender to him. He also made deposits and drew checks, and balances were struck in his book from time to time. His account continued to be overdrawn, and as the overdraft increased he gave other notes, which were renewed and carried into the account in the same way. None of the renewal notes was ever accepted as payment of the original debt. *Held*, that the collateral note and mortgage had not been paid. *Lowry v. Milwaukee Nat. Bank*, 311

2. Plaintiff, who was defendants' financial agent, at their request paid their note to a bank, and charged the amount to them in their account. Afterwards an account was stated between the parties, whereby, with defendants' assent, the note was taken out of the account, to be held by plaintiff as an outstanding obligation. Plaintiff then collected the amount of the note from one W., an accommodation maker with defendants, but was

compelled, at the suit of W., to make restitution on the ground that the note had been paid by plaintiff at the bank. Plaintiff repossessed himself of the note and brought action thereon against defendants. *Held*, that defendants are estopped to assert that the note is not, as to them, an outstanding obligation. *Grunert v. Speich*, 355

3. If a person gives his check to another on condition that it shall not be presented to the drawee bank for payment till funds are produced in such bank by the payment of a check given to it by such person upon another bank, he impliedly agrees that the latter check shall be paid within a reasonable time, and if, by his connivance or consent, or otherwise, it is not so paid, such other may present his check for payment notwithstanding, and upon its dishonor sue to recover thereon. *Batavian Bank v. North*, 637

BONDS.

See EXECUTIONS. MUNICIPAL CORPORATIONS, 5.

A bond was drafted in form for two sureties, but the name of one only was inserted. It was signed by the principal in the proper place and also at the foot of an imperfect affidavit of justification, which was originally drafted for two sureties but afterwards changed for one. The surety signed only at the foot of said affidavit, and the seals were also there. The surety testified that he had refused to sign as surety, but had agreed to do so if another satisfactory surety were found; that he signed the affidavit merely to indicate his willingness to become a surety, and delivered the paper to the principal with the understanding that when the other surety should be procured the two sureties and the principal would go before an officer and perfect the instrument. The principal thereafter procured a notary to sign the affidavit, and delivered the bond in the form above indicated to the obligees. *Held*, that the condition of the instrument was such as to put the obligees upon inquiry as to whether the surety signed the affidavit with the intention of executing the bond; and that the evidence sustains a finding that he did not execute the bond and that he was not guilty of negligence which reasonably misled the obligees. *Polacheck v. Moore*, 261

BOUNDARIES.

The building of a division fence upon the assumption by both parties that it is upon the true line, and occupation up to it by both parties for less than twenty years, do not constitute a binding location of the line, where there was no dispute or uncertainty as to the correct line, no express agreement that the fence should be regarded as such line, and no circumstances such as should estop either party from insisting upon the true boundary. *Peters v. Reichenbach*, 209

BRIEFS. See APPEAL, 25.

BUILDING AND LOAN ASSOCIATIONS.

1. Where a building and loan association has no right to loan money except to members, an application for a loan by a non-member, the making of the loan, and the issue of a certificate of stock

to him, must be considered as parts of one transaction, making him a member, and neither he nor an assignee of the stock can be heard to question the regularity of the transaction. *Boleman v. Citizens' L. & B. Asso.* 217

2. Although sec. 2011, S. & B. Ann. Stats., provided that in case of default for *six months* in payments on a loan from a building and loan association the whole amount might be collected, a provision in the bond given by a borrower, that upon default in payments for *three months* the whole principal should become due, did not affect the essence of the loan and is immaterial in an action to redeem from the mortgage, where there is no attempt to enforce such provision. [Whether the parties might legally contract for a period different from that named in the statute, not determined.] *Ibid.*

3. Under sec. 2011, S. & B. Ann. Stats. (providing that the by-laws of every building and loan association should fix the time of holding periodical meetings at which the money in the treasury should be offered for loan in open meeting, and that the stockholder who should bid the highest premium for a loan should be entitled thereto, etc.), the meetings at which such money should be offered might be open meetings of the board of directors where any or all stockholders might be present, and the by-laws might authorize bids to be made in writing, filed with the secretary, by stockholders not present at the meeting. *Ibid.*

4. Where no fixed rate of premium had been adopted by the directors of a building and loan association, the facts that a great majority of loans were made at a certain rate of premium, and that the secretary had advised applicants that such rate would probably mature their shares in a given time, do not show that an arbitrary standard of rates had been fixed. *Ibid.*

5. The evidence in this case (showing among other things that the business of loaning the moneys of a building and loan association was conducted, not by the members generally, but by the board of fifteen directors; that there were two classes of members,—borrowers and nonborrowers; and that the power of management was in the board of directors) is *held* not to sustain a finding of the trial court that the plan of the association was merely to loan money at high rates under that guise in order to evade the law and avoid the penalties of usury. *Ibid.*

6. Dues on his stock, paid monthly by a borrower from a building and loan association, do not reduce the principal of the loan so as to render interest paid upon the whole amount usurious, where by the contract such dues are not to be applied on the loan until the stock reaches its par value. *Ibid.*

7. Under sec. 2013, S. & B. Ann. Stats., if the interest reserved by the contract was within the legal rate, the fact that the interest and premium payments together exceeded that rate did not make the transaction usurious. *Ibid.*

BURDEN OF PROOF. See CORPORATIONS, 9. MALICIOUS PROSECUTION, 1.

BY-LAWS of corporation: Assessments. See CORPORATIONS, 2.

CALLS on stock subscriptions: Pleading. See CORPORATIONS, 2, 3.

CASES DISTINGUISHED, ETC.

1. *Allen v. Boberg*, 108 Wis. 282 (as to appealable order), distinguished. *State by Att'y Gen. v. German Exch. Bank*, 438

2. *Baker v. McLeod's Estate*, 79 Wis. 534; *In re Donges's Estate*, 103 Wis. 497 (as to construction of will), distinguished. *O'Hearn v. O'Hearn*, 432
3. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307; *Selleck v. Janesville*, 104 Wis. 570; *Mauch v. Hartford*, 112 Wis. 48 (as to photographs), distinguished, *Hupfer v. National D. Co.* 295, 296
4. *Belden v. Hurlbut*, 94 Wis. 562; *New Home S. M. Co. v. Simon*, 104 Wis. 120; *Rehbein v. Rahr*, 109 Wis. 136 (as to execution of instrument), distinguished. *Polacheck v. Moore*, 264
5. *Bigelow v. Sickles*, 80 Wis. 98 (as to want of probable cause), distinguished. *Cullen v. Hanisch*, 26, 34
6. *Cahill v. Layton*, 57 Wis. 600. See No. 13.
7. *Cannon v. Home Ins. Co.* 53 Wis. 593 (as to waiver), distinguished. *Fraser v. Ætna L. Ins. Co.* 522
8. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279. See No. 16.
9. *Durkee v. Janesville*, 26 Wis. 697 (as to title of statute), distinguished. *Diana Shooting Club v. Lamoreux*, 47, 48
10. *Hekla F. Ins. Co. v. Morrison*, 56 Wis. 133 (as to paramount title), distinguished. *Herman v. Felthousen*, 427
11. *Hilgers v. Quinney*, 51 Wis. 62 (as to posting notices), limited. *Allen v. Allen*, 623
12. *In re Donges's Estate*, 103 Wis. 497. See No. 2.
13. *Johnson v. L. S. T. & T. Co.* 86 Wis. 64; *Cahill v. Layton*, 57 Wis. 600 (as to injury to licensee), distinguished. *Hupfer v. National D. Co.* 290
14. *Ketchum v. Wells*, 19 Wis. 25 (as to duress), distinguished. *Porter v. Cook*, 60, 65
15. *Ludington v. Harris*, 21 Wis. 239 (as to usury), distinguished. *Boleman v. Citizens' L. & B. Asso.* 218, 232
16. *Maitland v. Gilbert P. Co.* 97 Wis. 476; *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279 (as to finding of proximate cause), distinguished. *Allen v. Voje*, 20
17. *Mauch v. Hartford*, 112 Wis. 48. See No. 3.
18. *New Home S. M. Co. v. Simon*, 104 Wis. 120. See No. 4.
19. *Paul v. Kenosha*, 22 Wis. 266 (as to restoration to former situation), distinguished. *Rice v. Ashland Co.* 139
20. *Pelton v. Powell*, 96 Wis. 473 (as to counterclaim), distinguished. *Gutzman v. Clancy*, 593
21. *Pickett v. Nelson*, 71 Wis. 542 (as to estoppel), distinguished. *Peters v. Reichenbach*, 216
22. *Pier v. Oneida Co.* 93 Wis. 463 (as to filing statement of tax sales), limited. *Allen v. Allen*, 616, 624
23. *Putney v. Cutler*, 54 Wis. 66 (as to *fac simile* of seal), distinguished. *Peters v. Reichenbach*, 212
24. *Reed v. Madison*, 85 Wis. 667 (as to motion for new trial), limited. *Lawless v. State*, 189, 191
25. *Rehbein v. Rahr*, 109 Wis. 136. See No. 4.
26. *Selleck v. Janesville*, 104 Wis. 570. See No. 3.
27. *State v. Heinemann*, 80 Wis. 253. See No. 34.
28. *State ex rel. Curtis v. Town Board*, 107 Wis. 1 (as to private aid to town), distinguished. *Shelby v. Miller*, 663

29. *State ex rel. Kellogg v. Currens*, 111 Wis. 431. See No. 34.
30. *State ex rel. Winkler v. Benzenberg*, 101 Wis. 172. See No. 34.
31. *Taylor v. State*, 35 Wis. 298. See No. 34.
32. *Washburn Co. v. Thompson*, 99 Wis. 585 (as to settlement of claims against county), distinguished. *Quayle v. Bayfield Co.* 115
33. *Webb v. Meloy*, 32 Wis. 319 (as to merger), distinguished. *Herman v. Felthousen*, 427
34. *Yates v. Milwaukee*, 12 Wis. 673; *Taylor v. State*, 35 Wis. 298; *State v. Heinemann*, 80 Wis. 253; *State ex rel. Winkler v. Benzenberg*, 101 Wis. 172; *State ex rel. Kellogg v. Currens*, 111 Wis. 431 (as to laws restricting freedom), distinguished. *State ex rel. Zillmer v. Kreutzberg*, 547, 548

CATTLE GUARDS. See RAILROADS.

CHANGE OF VENUE. See VENUE.

CHATTEL MORTGAGES. See SALES, 2, 3.

CHECKS. See BILLS AND NOTES, 3. FORGERY.

CITIES. See MUNICIPAL CORPORATIONS.

CITY ATTORNEY. See MUNICIPAL CORPORATIONS, 1.

CLAIMS.
Against assigning debtor. See ASSIGNMENT FOR BENEFIT OF CREDITORS.
Against county: Settlement. See COUNTIES, 1, 2.
Against decedent. See EXECUTORS, 3.

CLERK OF COURT. See APPEAL, 4, 5, 10, 11. JUDGMENT, 1.

CO-EMPLOYEES. See MASTER AND SERVANT, 5–7.

COLLATERAL SECURITIES. See BILLS AND NOTES, 1. COMPROMISE AND SETTLEMENT.

COMPLAINT by wife for assault by husband. See CRIMINAL LAW, 1.

COMPROMISE AND SETTLEMENT.

Either the conveyance by a debtor of an absolute title to property held collaterally, or a waiver of his right to the benefit of the federal bankrupt laws, is a sufficient consideration to support a settlement of the indebtedness upon payment of a part only of the amount due. *Herman v. Schlesinger*, 382

CONDITION PRECEDENT to right to recover. See MUNICIPAL CORPORATIONS, 7.

CONDITIONAL RECOVERY: Judgment. See MUNICIPAL CORPORATIONS, 12.

CONDITIONAL REVIVAL of policy. See INSURANCE.

CONFIDENTIAL COMMUNICATIONS to attorney. See WITNESSES, 1–5.

CONSIDERATION. See COMPROMISE AND SETTLEMENT.

CONSPIRACY.

1. An express agreement between the conspirators is not essential to an actionable conspiracy. It is enough if there is a tacit concurrence in mental intent to effect the common purpose. *Patnode v. Westenhaver*, 460
2. In an action by a widow for damages alleged to have been caused by the formation and execution of a conspiracy to obtain her

property through false promises of marriage made by one of the defendants, the evidence, though circumstantial, is *held* sufficient to warrant the submission to the jury of the question of the existence of such conspiracy. *Ibid.*

3. Plaintiff had conveyed real estate to one of the defendants, taking his notes for a part of the purchase price, and had then given back to him one of such notes for $1,500. She testified that it was her purpose to give him $1,500, not a specific part of the realty as such, and that to effect such purpose she took from him the note as a security of the value of $1,500, and then delivered it to him as a gift for that amount and in view of her expectation to become his wife, the understanding between the two being that the property was to be enjoyed by them mutually. *Held*, that the credibility of such testimony was for the jury, although it was not consistent with many things in letters written by her to him while she was infatuated with him and under his influence. *Ibid.*

4. The fact that, after the alleged breaking of the engagement of one of the defendants to marry her, plaintiff followed his advice and married another man, and thereafter expressed satisfaction with having gained a protector and a home, does not show an abandonment of the engagement by mutual agreement, there being evidence that plaintiff was so under defendant's influence that in what she did she executed his will, not her own. *Ibid.*

5. The bringing of an action by plaintiff against one of the defendants to recover the amount of one of the notes given by him for a part of the purchase price of her real property, did not preclude her from afterwards maintaining this action against all the defendants for damages caused by the execution of the fraudulent conspiracy. *Ibid.*

CONSTITUTIONAL LAW.

Statutes: Title expressing subject.

1. As regards sec. 18, art. IV, Const., the statement of a subject in the title of a legislative enactment is deemed to constitutionally suggest all the details thereof, including everything found in the body of the act which facilitates its object. *Diana Shooting Club v. Lamoreux*, 44

2. The constitution does not require the title of a private or local legislative act to go further than to express the subject covered by the body of the law. It leaves the method of expressing such subject to legislative discretion, within all reasonable boundaries. *Ibid.*

3. The statement of a primary purpose in general terms in a constitutional sense reasonably includes all the means designed to facilitate the accomplishment thereof. *Ibid.*

4. The statement of the primary object of a legislative enactment as being the creation of a corporation for manufacturing purposes, within the meaning of the constitutional provision above mentioned suggests, as germane thereto and as part of the single purpose intended and expressed, authority to acquire and maintain a dam to create power for the use of the corporation, also to acquire lands affected by the backwater from the

dam, and authority to the owners of such lands to sell the same to the corporation. *Ibid.*

Statutes declaring their own intent or meaning: Powers of the courts. See STATUTES, 3.

Vacancies in office: Failure to provide for elections. See OFFICERS, 2.

Prescribing conditions on which foreign corporations may do business in this state: Interstate commerce. See CORPORATIONS, 5.

Public waters: Right to take ice, etc. See WATERS, 2–6.

5. A law treating some persons within the state differently than others, in respect to the enjoyment of public waters, violates the fourteenth amendment of the national constitution, guarantying to all persons within the jurisdiction of the state the equal protection of the laws. *Rossmiller v. State,* 169

6. The right to take ice from public waters within the state being a possession of all the people thereof, a law which exacts from any individual a sum of money as a consideration for the enjoyment of such waters, upon the theory that the state is the owner of the ice, violates the fourteenth amendment of the federal constitution, prohibiting any invasion of the right to liberty and property without due process of law, and violates sec. 13, art. I, of the state constitution, prohibiting the taking of private property for public use without just compensation. *Ibid.*

Taxation: Appropriations: Public purposes.

7. The taxing power of the state can be exercised only for public purposes; and the determination of the legislature upon the subject is not absolutely conclusive upon the courts. *State ex rel. New Richmond v. Davidson,* 563

8. A cyclone destroyed a large part of the city of New Richmond in June, 1899, killing and injuring many of its inhabitants. To bury the dead, care for the injured, clear up the debris to prevent disease and pestilence, and to relieve and aid the homeless, destitute, and impoverished, the city incurred large expense. Afterwards it borrowed from the state, out of the trust funds, the sum of $21,400. At the next session of the legislature, ch. 286, Laws of 1901, was enacted, making an appropriation from the general fund to the trust funds, for the purpose of relieving the city of its indebtedness. *Held,* that the appropriation was not for an object purely local to the city of New Richmond, but was for a public purpose, subserving the common interest and well-being of the people of the state at large, and that the act was therefore valid. DODGE, J., is of the opinion that the act in question might be sustained under the power vested in the legislature (recognized by sec. 8, art. VIII, Const.) to release or discharge a claim or demand of the state; that the constitutional limitations upon the power of taxation do not, by necessity, extend to or control the legislature in appropriations; and that appropriations may be made to defray the expense of governmental acts, even though they are to be done in a part of the state and not in the whole. *Ibid.*

Police power: Freedom of contract: Forbidding discharge of union employee.

9. Ch. 332, Laws of 1899, so far as it makes it an offense for any person or corporation to "discharge an employee because he is a member of any labor organization," is not a valid exercise of

the police power, but is an unwarranted interference with freedom in making private contracts, and is void as an infringement of the right to "liberty and the pursuit of happiness," guaranteed by the state and federal constitutions. *State ex rel. Zillmer v. Kreutzberg*, 530

CONTRACTS.

See BILLS AND NOTES. BONDS. BUILDING AND LOAN ASSOCIATIONS. COMPROMISE. CONSTITUTIONAL LAW, 9. CORPORATIONS, 4–10. INSURANCE. MASTER AND SERVANT, 1–3. MUNICIPAL CORPORATIONS, 4–12. OFFICERS, 4. SALES. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

Public policy: Surrender of official discretion.

1. Defendant's application to the town supervisors to lay out a highway to his lands was granted, but an action was brought to restrain the opening of the road. The supervisors decided not to defend, but at defendant's request permitted him to defend in their place, he agreeing to save the town harmless from all costs and expenses of the litigation. *Held*, that such agreement was against public policy, and that, on being compelled to pay the costs, the town could not recover the same from the defendant. *Shelby v. Miller*, 660

Duress.

2. Where the rights of the parties to a contract are in dispute, and one party makes an offer of compliance therewith in accordance with his construction of the contract, only upon condition that it settle the dispute, both parties having full knowledge and understanding as to how far it varies the rights asserted by the party to whom the offer is made, the acceptance or rejection of the offer is a matter of new contract, and the adoption of either course can be avoided for duress or coercion only when it is such as to override the will of the consenting party. *Ketchum v. Wells*, 19 Wis. 25, distinguished. *Porter v. Cook*, 60
3. In such case the fact that the party must decide between serious inconvenience, embarrassment, or loss as the result of electing either course, is not enough to avoid the effect of the course chosen. *Ibid.*
4. Duress of a person is that condition of such person's mind, caused by wrongful conduct on the part of another, rendering the former incompetent to contract by the exercise of his own free will. *Batavian Bank v. North*, 637
5. Any amount of persuasion to influence one to exercise his own will to some particular end does not constitute duress. *Ibid.*

Particular contracts construed.

6. A lumber company contracted with a partnership, engaged in the cooperage business, to furnish "slabs, edgings, and trimmings as they came from its mills," for which the lumber company was to be paid sixty cents per 1,000 pieces of headings manufactured therefrom. The partnership guaranteed that the lumber company should receive $25 for each 200,000 feet of lumber manufactured. *Held*, that there was no agreement or guaranty, express or implied, that the lumber furnished should be of dimensions and quality sufficient to enable the partnership to manufacture any specified number of pieces of headings

from each and every 200,000 feet of lumber, and that instructions to the effect that there was such agreement were erroneous. *Ashland L. Co. v. Detroit S. Co.* 66

7. In such case, although inconsistent and out of harmony with said portions of the charge which were erroneous, it is not error to charge the jury that the lumber company was "bound to furnish such material, of the same or similar character, dimensions, and quantities, in the ordinary course of business, as they had been and were manufacturing at the date of this written contract," and, further, that the partnership had a right, under the contract, to assume that the plaintiff would not materially change its manner of slabbing its logs and trimming its lumber, although there was no express stipulation to that effect. *Ibid.*

8. Under such contract, plaintiff would be entitled to recover according to the terms of the guaranty, until failure to so furnish or until there was a change in the manner of slabbing or trimming, and thereafter for what the material received was reasonably worth. *Ibid.*

9. In such case it is not error to allow the partnership to show an estimate, made prior to said contract, of the number of pieces of headings which could be realized from the kind of slabs, edgings, and trimmings then coming from the lumber company's mill, and that the contract was made with reference to such conditions. *Ibid.*

10. A contract made by letters and telegrams between wholesale coal dealers and a retailer is construed to be an absolute contract to deliver as much as two car loads of coal per week, subject only to strikes, and a scarcity of cars is *held* to constitute no excuse for a breach. *Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.* 654

11. The words "subject to strikes," in a written contract to deliver coal, may be shown by parol evidence to have acquired, by general usage in the coal trade, a definite meaning which would include a strike limited to the vendor's mines, as well as a general strike in all mines. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See RAILROADS, 2, 3.

CONVERSION of water. See WATERS, 8.

CONVEYANCES. See COUNTIES, 3–7. TAX TITLES, 1, 2. USURY. VENDOR AND PURCHASER.

CORPORATIONS.

Purposes for which created: Powers. See CONSTITUTIONAL LAW, 4.

Stock: Payment in labor or property.

1. The twenty per centum of the par value of one half of the capital stock, which, under sec. 1773, Stats. 1898, must have been actually paid in before a corporation may transact business with others than its members, may be paid in labor or property estimated at its true money value. *La Crosse Brown H. Co. v. Goddard,* 610

Calls and assessments: Notice: Pleading.

2. An allegation that calls or assessments on corporate stock were made by the directors pursuant to the by-laws of the company and pursuant to the authority in them vested, and that defendant had due and personal service and notice thereof, is *held,* on

demurrer, sufficiently to allege that the assessments were made and notice thereof given as prescribed by the by-laws of the corporation. *Ibid.*

3. An allegation that a certain percentage of the par value of stock was assessed upon each and every share, sufficiently shows that the assessment was equal and uniform upon all subscribers to the stock. *Ibid.*

Foreign corporations: Conditions of right to do business: Validity of contracts.

4. Sec. 1770*b*, Stats. 1898, as amended by ch. 351, Laws of 1899, provides conditions on which foreign corporations may do business within Wisconsin; imposes penalties for failure to comply therewith; and declares that contracts made by such corporations, affecting its personal liability, or relating to property within this state, before it complies with the statute, "shall be wholly void on its behalf . . . but shall be enforceable against it." *Held*, that the words "wholly void," in said section, mean void absolutely, and not merely voidable at the option of the other party. *Ashland L. Co. v. Detroit S. Co.* 66

5. Such statute involves no question of foreign or interstate commerce, and is valid, however harsh its provisions may seem to be. *Ibid.*

6. Where a contract is made by a partnership consisting of M. and two foreign corporations, which had failed to comply with the requirements of sec. 1770*b*, Stats. 1898, as amended, the contract being void as to the corporate members of the partnership, M., as an individual, acquires no rights thereunder. *Ibid.*

Officers: Wrongful acts: Recovery of money received. See MONEY RECEIVED, 2.

Agents: Authority to make contracts.

7. A general agent of a corporation has authority to bind his principal in respect to all the usual means of carrying out the work under his charge. *Ames v. D. J. Murray Mfg. Co.* 85

8. In an action against a corporation for breach of a contract of employment, the evidence, among other things, tended to show that the corporation placed B. as foreman in charge of constructing a mill; that the plaintiff was employed to work for the corporation until the construction of its mill was completed. The contract was made with the foreman, who employed and discharged men and occupied the position of general foreman of the job. *Held*, that it was error to instruct the jury, in substance, that such contract was within the general scope of the foreman's authority, and that evidence that it was not the custom to hire men for definite periods of time in doing such work had no bearing on the question of the foreman's authority, but only on the question as to whether or not the plaintiff was employed as alleged. *Ibid.*

9. The burden of proving that such agent had such authority is on the party relying thereon to make out his cause of action. *Ibid.*

10. In such case proof of a custom is not to show what the agent did in the course of his agency, but what was within the scope of his authority to do. *Ibid.*

Conveyance of land to corporation: Agreement. See PARTITION, 1.

Building and loan associations. See BUILDING AND LOAN ASSOCIATIONS.

CORROBORATION. See CRIMINAL LAW, 7, 8. RAPE.

COSTS.

See APPEAL, 1. CONTRACTS, 1.

Under sec. 2942, Stats. 1898, an application for an order requiring security for costs is addressed to the sound discretion of the trial court. *Cullen v. Hanisch*, 24

COUNTERCLAIM. See MUNICIPAL CORPORATIONS, 11. PLEADING, 3.

COUNTIES.

Powers of county board: Settlement of claims. See INJUNCTION, 2, 3.

1. While county boards have power to settle doubtful claims, and a claim may be considered doubtful, although reduced to judgment, if the judgment is open to reversal in a higher court and proceedings are pending to that end, such power cannot be extended to claims which are, obviously, absolutely void. *Quayle v. Bayfield Co.* 108
2. An attempted settlement and payment of such claim, after an adjudication by a trial court that it was baseless, and during pendency of an appeal therefrom, is a reckless use of official position by the county board, for which even alleged advice of the district attorney is not a palliating circumstance. *Ibid.*

Taxes twice collected: Recovery from county. See TAXATION.

Void sale of land: Recovery of purchase money from county.

3. A resolution of the county board authorized the clerk to sell and convey the county's interest in lands on certain specified conditions, but by mistake the clerk sold for a sum insufficient to satisfy such conditions, by reason whereof the deeds were void. The purchase money was covered into the treasury and used for legitimate county purposes. *Held*, that the purchaser had a good cause of action against the county for the recovery of such money, and that such cause of action accrued at the time when the money was actually used by the county. *Rice v. Ashland Co.* 130
4. The liability of the county to return the money in such case rests upon the broad equitable doctrine that where, in a transaction not prohibited by law or involving moral turpitude, a county or other public corporation obtains money without authority of law, and uses the same in lieu of moneys obtained or that would otherwise have to be procured by legitimate taxation, the person from whom the same was obtained not receiving any consideration therefor, the money should be restored. *Ibid.*
5. The county was not liable in such case for interest on the purchase money prior to the demand for its return. *Ibid.*
6. The purchasers from the county having conveyed some of the lands to third persons and being to that extent unable to restore the county to its former situation, and it not appearing that there is any liability on their part to their grantees, the amount which they may recover from the county is reduced by the amount which they received from said grantees. *Ibid.*
7. Plaintiffs having paid their money to the county in good faith, the fact that they relied wholly on the clerk's computation in determining whether the amount paid was sufficient to authorize him to convey the lands, or that they were parties to the

mistake in the computation, or that the clerk told them that if the deeds were void they could not recover their money, does not militate against their right to recover; and there was therefore no error in refusing to grant a new trial on the ground of newly discovered evidence to show such facts. *Ibid.*

COUNTY SURVEYOR.

Under sec. 771, Stats. 1898 (providing that the "certificate of the county surveyor . . . shall be admitted as legal evidence in any court"), an official certificate of the county surveyor declaring the making of the survey therein set forth, is admissible in evidence. The purpose of said section is not merely to give admissibility to certified copies of the official record of surveys. *Peters v. Reichenbach,* 209

COURT AND JURY. See TRIAL, 6–23.

COURTS.
State and federal. See ACTION. APPEAL, 13, 14. BANKRUPTCY. PLEADING, 4.
Supreme court. See APPEAL. SUPREME COURT.
Death of trial judge before judgment. See JUDGMENT, 3.
Powers as to construing statutes and declaring them invalid. See CONSTITUTIONAL LAW, 7. STATUTES, 2, 3.

CREDITORS' REMEDIES. See ASSIGNMENT. BANKRUPTCY. COMPROMISE. EXECUTION. EXECUTORS. GARNISHMENT. LIENS. PARTNERSHIP.

CRIMINAL CONVERSATION. See HUSBAND AND WIFE. TRIAL, 1–3.

CRIMINAL LAW AND PRACTICE.

See ADULTERY. ASSAULT AND BATTERY, 3, 4. CONSTITUTIONAL LAW, 9. FORGERY. HOMICIDE. OFFICERS, 4. RAPE.

Complaint by wife against husband for assault.

1. The complaint against a husband for an assault upon his wife may be sworn to by her. *Goodwin v. State,* 318

Information: Restricting proof to particular day.

2. From an information charging the commission of an offense on a certain day, the court refused to strike out words charging also its commission "on divers other days and times" between said day and a subsequent date; but defendant was tried only for the offense committed on the day first named, and the jury were restricted to that particular day in considering the case. Held, that there was no prejudicial error. *Lanphere v. State,* 193

Withdrawal and re-entry of plea.

3. Where a plea of not guilty is withdrawn by leave of court to enable defendant to enter a special plea, and the latter is overruled, the former plea may be re-entered by the court without a formal re-arraignment and plea by the defendant. *Ibid.*

4. In such a case by failing to object to the re-entry by the court of the plea of not guilty, and by going to trial on the merits, defendant waives any irregularity in such re-entry of the plea. *Ibid.*

Special plea: Court and jury: Judicial notice of record.

5. Where, upon a special plea (in this case a plea of former jeopardy, alleging that the jury at a former trial was discharged

without defendant's consent), the facts are all to be determined from the record, the court may take judicial notice of the record and decide the question without a finding of the jury. *Lanphere v. State,* 193

Insanity: Special issue: Definition.

6. Upon the trial of a special issue of insanity, it was not error to refuse an instruction to the effect that the verdict should be not guilty if the killing was the offspring or product of mental disease in the defendant, and to make predominant the idea that if the defendant, at the time of the homicide, had sufficient mind to know right from wrong and to understand the nature and quality of the act he was committing, then he was sane, in law. *Eckert v. State,* 160

Instructions to jury.

7. Although if a witness wilfully testifies falsely as to any material matter the jury may properly reject all of his testimony which is not corroborated by some other credible evidence, yet on a trial for rape where the case rested mainly upon the testimony of the prosecutrix and that of the defendant, either of whom might have testified falsely as to some matters, though not wilfully so, it was prejudicial error to charge the jury that "it is a rule of common sense and sound logic that a party who testifies falsely upon any material question shall not be believed upon any other question, unless his evidence is fully and strongly corroborated." *Lanphere v. State,* 193

8. An instruction on a trial for rape that "the prosecutrix has been corroborated in many respects as to almost every fact that she testified to," was an invasion of the province of the jury, and prejudicial error. *Ibid.*

9. An instruction that the evidence produced by defendant to show an alibi did not necessarily establish beyond question the impossibility of his having committed the crime as charged, was erroneous, since it might have been so understood by the jury as to be prejudicial. *Ibid.*

CROSS-EXAMINATION. See WITNESSES, 10–13.

CUSTOM. See CORPORATIONS, 10. MASTER AND SERVANT, 4. NEGLIGENCE, 1.

DAMAGES.

See APPEAL, 6. ASSAULT AND BATTERY, 2. CONTRACTS, 8. COUNTIES, 5, 6. INJUNCTION, 4. PHYSICIANS, 12. SALES, 8. SPECIFIC PERFORMANCE, 3. TRESPASS, 1, 2. TRIAL, 3.

Upon testimony tending to show that although technically the defendant, a policeman, had unlawfully deprived plaintiff of her liberty, yet that he had arrested her because he believed her insane and in need of care for her own safety; that she suffered no indignity other than transportation in the patrol wagon to the station house; and that before the arrest she was momentarily exposing herself on the streets to a far higher degree of notoriety and disgrace,—it is *held* that there was no abuse of discretion in refusing to set aside as inadequate a verdict for nominal damages. *Wegner v. Risch,* 270

DEATH of trial judge before judgment. See JUDGMENT, 3.

DEBTOR AND CREDITOR. See ASSIGNMENT. BANKRUPTCY. COMPROMISE. EXECUTION. EXECUTORS. GARNISHMENT. LIENS. MONEY RECEIVED. PARTNERSHIP. PLEADING, 2. USURY.

DEEDS. See EVIDENCE, 2. TAX TITLES, 1, 2. USURY. VENDOR AND PURCHASER.

DEFAULT. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

DEFICIENCY on sale. See JUDGMENT, 4.

DEFINITIONS. See WORDS AND PHRASES.

DELAY barring relief. See INJUNCTION, 3. LIENS. VENDOR AND PURCHASER, 4.

DEMAND. See MUNICIPAL CORPORATIONS, 5. PLEADING, 2.

DEMURRER. See APPEAL, 3. MUNICIPAL CORPORATIONS, 1.

DEPOSITIONS.

1. Under sec. 4090, Stats. 1898, depositions may be read in evidence only upon condition that they have been filed with the clerk of the court and the other party notified thereof before the commencement of the trial. *Herman v. Schlesinger*, 382

2. After defendant had introduced extracts from plaintiff's deposition taken under sec. 4096, Stats. 1898, it was not a reversible error to permit plaintiff to introduce, over a mere general objection, the whole of the deposition, where parts of it qualified and explained the extracts introduced, although other parts were inadmissible. *Gutzman v. Clancy*, 589

DESCRIPTION of land. See TAX TITLES, 1.

DISCONTINUANCE.

After a cause has been submitted for decision plaintiff cannot discontinue without the assent of the court. *Grunert v. Speich*. 355

DISCRETION. See APPEAL, 7, 8. ASSIGNMENT FOR BENEFIT OF CREDITORS. BANKRUPTCY, 1. CONSTITUTIONAL LAW, 2. COSTS. DAMAGES. INJUNCTION, 2. PLEADING, 6, 7. SPECIFIC PERFORMANCE. TRIAL, 17–22.

DISMISSAL of action for failure to prosecute. See APPEAL, 9, 27.

DISTRICT ATTORNEY. See COUNTIES, 2.

DIVISION of property. See DIVORCE, 1.

DIVORCE.

1. A judgment of divorce from bed and board, divesting each party of all interest in the real estate owned by the other, confirming title in each, giving plaintiff the household furniture, and requiring defendant to pay her a certain sum each month for her support, is *held* not to make a final division of the defendant's estate, but to provide for alimony only, and to be subject to revision under sec. 2369, Stats. 1898. [Whether under sec. 2364 the court may both make a division and grant alimony, not determined.] *Palica v. Palica*, 236

2. Where an application for revision of an allowance of alimony presents a *prima facie* case for relief, the court should not act upon affidavits of the parties, but should either summon wit-

nesses and take testimony or direct a reference for that purpose. *Ibid.*

3. Payment of alimony as allowed cannot be avoided merely because it is burdensome, but there must be a showing that further payments are not necessary, or of such inability to pay as reasonably to excuse performance. *Ibid.*

DOCKETING of judgment. See BASTARDY.

DRAINS. See EMINENT DOMAIN.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 6.

DURESS. See CONSPIRACY, 4. CONTRACTS, 2–5.

EASEMENTS.

The owners of a lot conveyed to plaintiffs a part thereof on which there was a two-story building, and granted to them also the use of a stairway "as the same is now constructed and used, and on and adjoining" the property conveyed, "so long as the same shall there remain." The deed attempted also to create a permanent easement for a stairway three feet wide, to be used in common, one half on the land conveyed to plaintiffs and one half on the adjoining part of the lot, afterwards conveyed to defendant. The building on defendant's part of the lot, in which was the stairway, was about fourteen inches over the line upon plaintiffs' part, and they compelled her to move it and the stairway entirely upon her own land, and then moved their building up to the division line, refusing her offer to make with them a common stairway, one half on each side of the line. *Held*, that no permanent easement in the existing stairway had been granted, and that plaintiffs had, by their conduct, extinguished the temporary easement and had no further right to use defendant's stairway located entirely on her own land. *Stenz v. Mahoney*, 117

EJECTMENT.

Ejectment can be maintained only by one out of possession. *Peters v. Reichenbach*, 209

ELECTION between remedies. See WATERS, 8.

ELECTIONS. See OFFICERS, 2.

ELECTRIC LIGHTING. See MUNICIPAL CORPORATIONS, 4–12.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 6.

The provision in sec. 3187*a*, Stats. 1898, as amended, that a resolution or order taking or affecting land for the purposes therein mentioned, without an application having been made therefor, shall have no effect unless it be "recorded," means recorded in the office of the register of deeds of the county in which the land is situated, as prescribed in another part of the section. *Svennes v. West Salem*, 650

EQUAL PROTECTION of the laws. See CONSTITUTIONAL LAW, 5.

EQUITY.

See APPEAL, 26. COUNTIES, 4. INJUNCTION. LIENS. MONEY RECEIVED. PARTITION, 2. SPECIFIC PERFORMANCE. STREET RAILWAYS, 1, 2.

In an action by the owner of a life estate in land against the owners of the estate in remainder, subject to certain contingencies, to obtain judicial authority to sell a part of the property, including all estates therein, in order to prevent a threatened destruction of such estates by tax and other liens, the decree authorized the sale of certain lots specifically mentioned in the complaint and also, in case of necessity, the sale of other lands upon application and order of the court at the foot of the decree. The amount realized from sales of the lots specifically mentioned proved insufficient to discharge the liens. *Held*, that an order authorizing the sale of another parcel for that purpose was within the power of the court and was proper. *Ruggles v. Tyson*, 301

ESTATES OF DECEDENTS. See EXECUTORS. WILLS.

ESTOPPEL. See BILLS AND NOTES, 2. BOUNDARIES. INSURANCE, 6. PARTITION, 1.

EVIDENCE.

Judicial notice. See CRIMINAL LAW, 5.

Presumptions. See MASTER AND SERVANT, 1–4. VENUE, 2. WILLS.

Burden of proof. See CORPORATIONS, 9. MALICIOUS PROSECUTION, 1.

Admissions. See ASSAULT AND BATTERY, 4.

Photographs: Admissibility, etc. See NEGLIGENCE, 2, 3.

Documentary evidence: Bill of particulars.

1. A bill of particulars served in response to a demand, but not identified or verified as correct by any witness, does not constitute affirmative proof of any fact, as against the opposite party. *Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.* 654

Same: Certificate of survey. See COUNTY SURVEYOR.

Same: Record of deed: Device indicating seal.

2. Where, in order to entitle a deed to be recorded, a certificate thereon must have an official seal affixed, the register's record of such deed is not admissible in evidence under sec. 4156, Stats. 1898, unless it bears some device indicating the existence of such seal upon the original, even though the certificate recites that the seal has been affixed. *Peters v. Reichenbach*, 209

Same: Letters: Genuineness: Court and jury.

3. The question being whether certain letters were written by defendant, one witness, who had seen defendant write a little, testified that he thought the letters were in defendant's handwriting, and another witness, a bank cashier, accustomed to examine handwriting, testified, after comparing the letters with an admittedly genuine signature of defendant, that in his opinion the same person wrote them all. *Held*, sufficient to warrant the admission of the letters in evidence, their genuineness being still a question for the jury. *Monteith v. State*, 165

Parol evidence to show meaning of words in contract. See CONTRACTS, 11.

Opinion evidence: Hypothetical questions. See APPEAL, 15, 16, 24. LANDLORD AND TENANT, 1. PHYSICIANS, 1–8. TRIAL, 7.

Evidence in particular cases. See ADULTERY. APPEAL, 26. ASSAULT AND BATTERY, 2–4. CONSPIRACY, 3. CONTRACTS, 9. CORPORATIONS, 8–10. DIVORCE, 2. HUSBAND AND WIFE, 1–3. MALICIOUS PROSECUTION. MASTER AND SERVANT, 13. RAPE. SALES, 6–8.

Examination of witnesses: Privileged communications, etc. See WITNESSES.

Depositions. See DEPOSITIONS.

EXAMINATION of witnesses. See WITNESSES.

EXCEPTIONS. See APPEAL, 17–23.

EXECUTION.

1. Sec. 3034, Stats. 1898, requires that the undertaking, given for the appearance of the judgment debtor in proceedings supplementary to execution, shall be conditioned to require him from time to time to attend before the judge, as he shall direct, and that during the pendency of the proceedings the judgment debtor will not dispose of any portion of his property not exempt from execution. *Held*, that an undertaking, given in such proceedings, conditioned "that the defendant shall appear before the county judge on [an hour of a certain day], to answer as a witness in supplementary proceedings therein pending, and abide any order or judgment made therein," differs radically from that required by said statute, and is but a common-law bond. *Straw v. Kromer*, 91

2. Such undertaking is to be construed, as against the surety, as any other instrument—reasonably, but not so as to extend it beyond the fair import of its words. *Ibid.*

3. In such case, where it appeared that no order or judgment in the proceedings was made; that the judgment debtor appeared personally on the day mentioned in the undertaking, and by attorney on an adjourned day, but absconded before the day set by a further adjournment, no breach of the undertaking is shown, and the surety is released. *Ibid.*

4. In such case, where there is no evidence to show that the surety consented to any adjournment, the plaintiff is not prejudiced by any error in submitting to the jury the question whether the defendant (the surety) was present when the adjournments were taken and consented thereto. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

See PARTIES. WILLS.

1. Where, in a complaint, it was alleged that a cause of action against defendant was sold and assigned to plaintiff as administrator of a decedent's estate, for a valuable consideration, it sufficiently alleges plaintiff's legal capacity to sue. *Brossard v. Williams*, 89

2. In such case, if plaintiff has a valid transfer of the claim as against his assignor, and defendant has no interest in the es-

tate represented by plaintiff, the defendant is protected and has no interest to inquire further. *Ibid.*

3. Services of an attorney rendered to an administrator constitute a claim against the latter personally, to be charged against the estate if reasonable and proper upon his accounting; and where the administrator has been discharged without payment for such services the attorney is not a creditor of the estate and cannot apply under secs. 3807, 3808, Stats. 1898, for the appointment of an administrator *de bonis non*. *Wiesmann v. Daniels*, 240

4. Where an application for the appointment of an administrator *de bonis non* shows that a certain person is in possession, under some claim of right, of land which is sought to be sold to pay debts, such person has such an interest in the matter as entitles him to appear and oppose the application. *Ibid.*

EXPERT TESTIMONY. See APPEAL, 15, 16, 24. LANDLORD AND TENANT, 1. PHYSICIANS, 1–8. TRIAL, 7.

FALSE IMPRISONMENT. See DAMAGES.

FALSE REPRESENTATIONS. See INSURANCE.

FEDERAL COURTS. See ACTION. APPEAL, 13, 14. BANKRUPTCY. PLEADING, 4.

FEES of attorneys. See INJUNCTION, 4.

FELLOW-SERVANTS. See MASTER AND SERVANT, 5–7.

FENCES. See BOUNDARIES.

FILING of affidavits. See JUSTICES' COURTS. TAX TITLES, 3.

FINDINGS of fact. See APPEAL, 19, 23.

FISH AND GAME. See TRESPASS. WATERS, 2.

FORECLOSURE.
Of land contract. See VENDOR AND PURCHASER, 5.
Of liens. See JUDGMENT, 4. LIENS.
Of mortgages. See MORTGAGES. USURY.

FOREIGN CORPORATIONS. See CORPORATIONS, 4–6.

FORFEITURE. See INSURANCE.

FORGERY.

1. Insertion of the figure 5 before the figure 9 in a check reading "Pay to [defendant] or order $ 9.....fifty cents..... Dollars" is a material alteration, constituting a forgery, although the written words remained unchanged and the person cashing the check might by close observation have detected the change and prevented the consummation of the fraud. *Lawless v. State*, 189

2. The payee named in a forged check may be guilty of uttering it although he does not indorse it. *Ibid.*

FORMER JEOPARDY. See CRIMINAL LAW, 5.

FRANCHISES. See MUNICIPAL CORPORATIONS, 4–12. TELEPHONE COMPANIES. WATERS, 9, 10.

FRAUD. See BILLS AND NOTES, 3. CONSPIRACY. SALES, 4.

GAME. See TRESPASS. WATERS, 2.

GARNISHMENT.

The principal defendant, having the right under sec. 2765, Stats. 1898, to defend the garnishee action, may appear specially and move to dismiss the action against the garnishee. *Schomberg H. L. Co. v. Engel*, 273

GUARANTY. See CONTRACTS, 6–8.

HEARSAY EVIDENCE. See WITNESSES, 12.

HIGHWAYS. See CONTRACTS, 1. EMINENT DOMAIN.

HOMICIDE.

Defendant's testimony that during a violent quarrel with his wife, after threatening to kill him, she assaulted him with a razor, whereupon he seized a revolver in the drawer of a washstand and shot her twice, is *held* to sustain a conviction of murder in the second degree; and although the theory of the prosecution was that he deliberately shot his wife while she was asleep, defendant cannot object to a verdict based upon the supposed truthfulness of his own testimony. *Eckert v. State*, 160

HUNTING. See TRESPASS.

HUSBAND AND WIFE.

See CRIMINAL LAW, 1. PHYSICIANS, 6.

1. In an action for criminal conversation with plaintiff's wife, evidence that, after the alleged adultery and prior to the commencement of the action, he had obtained a divorce from her, was admissible. *Lee v. Hammond*, 550
2. In such action it was not error to permit plaintiff to prove the death of his wife. *Ibid.*
3. Plaintiff having offered to prove that after the divorce his wife came to her death by suicide, an objection was sustained and the jury were directed to disregard the statements of counsel as to the offer. *Held*, that there was no error prejudicial to defendant. *Ibid.*
4. A husband is not chargeable with connivance or consent merely because, after having reason to suspect his wife of infidelity, he vigilantly seeks proof of her unchastity, leaving open the opportunities already existing, but not making new ones or inviting the wrong. *Ibid.*

HYPOTHETICAL QUESTIONS. See APPEAL, 15, 16, 24.

ICE: Ownership: License fee for taking. See CONSTITUTIONAL LAW, 6. WATERS, 2–6.

IMPEACHMENT. See WITNESSES, 8–13.

INDEMNITY BONDS. See MUNICIPAL CORPORATIONS, 5.

INFORMATION. See CRIMINAL LAW, 2.

INJUNCTION.

See APPEAL, 3, 6. STREET RAILWAYS, 1.

1. The rule that a temporary injunction will be denied where all the equities of the complaint are unequivocally denied by

answer under oath, does not apply to a case where, notwithstanding the denials contained in the answer, or in that and supporting affidavits, there is yet reasonable probability that the defendant may ultimately be found in the wrong, and that, without temporary restraint pending the litigation, the suit will be entirely ineffective notwithstanding the plaintiff may recover judgment. *Quayle v. Bayfield Co.* 108

2. In a taxpayer's action to restrain a county from paying a claim alleged to be void, the complaint contained allegations reasonably entitling him to the relief demanded. The answer denied all the equities of the complaint. *Held*, under the circumstances alleged, that it was an abuse of discretion for the court to refuse to preserve, during the litigation, the *status quo* upon such terms as would protect the plaintiff if he finally succeeded, or in some other appropriate way control the situation so that the judicial remedy would serve its purpose. *Ibid.*

3. A taxpayer, who commenced his action shortly after a county board had allowed an illegal claim, but before a county order for its payment was completely perfected for delivery, is not guilty of laches. *Ibid.*

4. The damages sustained by reason of an injunction properly include attorneys' fees for services rendered in procuring the dissolution of the injunction, and also for services upon the reference to ascertain damages. *Wis. M. & F. Ins. Co. Bank v. Durner,* 369

INSANITY. See CRIMINAL LAW, 6.

INSOLVENCY. See APPEAL, 7. ASSIGNMENT FOR BENEFIT OF CREDITORS. BANKRUPTCY. COMPROMISE. PARTNERSHIP.

INSTRUCTIONS TO JURY. See APPEAL, 20–22. ASSAULT AND BATTERY, 4. CONTRACTS, 6, 7. CORPORATIONS, 8. CRIMINAL LAW, 6–9. LANDLORD AND TENANT, 2. MALICIOUS PROSECUTION, 1, 3. MASTER AND SERVANT, 10. PHYSICIANS, 9–11. TRIAL, 8–15, 21.

INSURANCE.

1. After a life insurance policy had lapsed for nonpayment of premium, proof of good health was demanded as a condition precedent to reviving it. The insured being absent from home, another person applied on his behalf for a revival of the policy, certifying in his name, as his agent, that he was in good health, and forwarded the premium. The application expressly stated that if the representation as to good health should prove untrue the policy should cease and be treated as if it had not been revived. In fact the insured was then at the point of death, and died two days later. The company, not knowing of the condition of the insured, gave its renewal receipt for the premium. *Held*, that the policy had been only conditionally revived, and that the company was not liable thereon. *Fraser v. Ætna L. Ins. Co.* 510

2. It is immaterial, in such case, whether or not the person applying for the revival had authority to make the representation as to the health of the insured. The application and representation were parts of a single transaction, and ratification of one would be a ratification of the other. *Ibid.*

3. It is immaterial, also, whether the representation was made in good faith or otherwise. The revival was conditioned upon its truth, not upon its good faith. *Ibid.*

4. Although the company was informed, when the application for revival was made, that the insured had been absent from home for several months, that fact does not indicate that the company did not, in issuing the renewal receipt, rely upon the representation as to his good health. *Ibid.*

5. The overdue premium was paid by a corporation of which the insured was president, and by request the insurance company, in addition to its renewal receipt, gave the corporation a receipted bill showing payment by it of the premium in full. *Held*, that this did not displace the express condition upon which the money was paid and accepted. *Ibid.*

6. Upon receiving proofs of death, showing the falsity of the representation as to the health of the insured, the company wrote to his executor stating that because of such falsity the policy could not be recognized as valid for the full amount, but that upon proper claim being made the company would pay a smaller sum, due thereon, by its terms, as a lapsed policy. The company also called attention to the fact that the assignment by the beneficiary to the executor was not properly stamped, and asked for certified copies of the will of the insured, etc. The executor thereupon affixed additional stamps to render the assignment valid, and sent the papers asked for. *Held*, that the company had not misled the executor into incurring expense or doing or omitting to do anything in the belief that the policy would be recognized as other than a lapsed policy, and that there was therefore no waiver of the forfeiture or estoppel to rely thereon as a defense. *Ibid.*

7. The policy having been revived conditionally only, failure of the condition *ipso facto* restored the former situation without any act of the company in the way of rescission or return of the premium. *Ibid.*

8. Mere retention of the premium, after obtaining knowledge of the facts, down to a time subsequent to the commencement of an action on the policy, did not indicate an intention to waive the forfeiture, there being a manifest purpose on the part of the company to account for the money to the owner of the policy whenever he would receive it, and the attitude of the latter being such as to indicate that a tender would be useless. *Ibid.*

9. In an action on the policy, an offer in the answer to return the premium is an admission of liability to that amount, and, there being no offer of judgment or payment of the money into court, plaintiff should have judgment for said amount with costs. *Ibid.*

INTENT. See SALES, 4. STATUTES, 2, 3.

INTEREST. See COUNTIES, 5. VENDOR AND PURCHASER, 3.

INTERSTATE COMMERCE. See CORPORATIONS, 5.

JOINDER.
Of causes of action. See MORTGAGES. PLEADING, 1.

JUDGMENT.

Rendition and entry: Reduction to writing.

1. An order or judgment is the decision of the court, formulated in writing by the judge, or declared by him orally; in the latter event the duty rests upon the clerk to write out the substance upon his records, in which case it becomes entered as completely as if written out by the judge himself and signed by him. *Allen v. Voje,* 1
2. Where an order or judgment is reduced to writing, the writing is, at most, but the evidence of the decision in fact made. *Ibid.*

Death of presiding judge before entry.

3. The judge of another circuit who was called in to preside at the trial having died, judgment was properly pronounced by the court with its own judge presiding. *Lanphere v. State,* 193

Docketing: Lien. See BASTARDY.

For deficiency or for further sale, etc. See EQUITY.

4. A final judgment, unappealed from, establishing a trust in favor of plaintiffs in land held by defendant, gave the latter a lien upon plaintiffs' interest and provided that in default of payment their interest should be sold to satisfy the same, but did not provide for any personal judgment in case of a deficiency arising on the sale. *Held,* that there could be no such judgment for deficiency. *Fuller v. Abbe,* 127

Vacating: Laches.

5. An application under sec. 2832, Stats. 1898, to set aside a judgment dismissing an action with costs, made nearly four years after the entry of the judgment and nearly three years after defendant's attorneys had collected from plaintiffs a part of the costs, is *held* to have been properly denied, although the judgment was obtained through plaintiffs' inadvertence, surprise, or excusable neglect, and their unopposed affidavits stated that they did not know of the judgment until about five months before making the application. *Buchan v. Nelson,* 234

Reversal on appeal. See APPEAL, *Affirmance and reversal.*

Judgments in particular cases. See INSURANCE, 9. MUNICIPAL CORPORATIONS, 10–12. PARTNERSHIP, 4–6.

JUDICIAL NOTICE. See CRIMINAL LAW, 5.

JUDICIAL SALES. See EQUITY. LIENS.

JURISDICTION. See ACTION. APPEAL, 2, 13, 14. BANKRUPTCY. JUSTICES' COURTS, 1. SPECIFIC PERFORMANCE, 3. SUPREME COURT.

JUSTICES' COURTS.

Replevin: Affidavit: Filing.

1. An affidavit for a warrant of replevin was sworn to before a justice and was present when he issued the warrant, but was taken away by the officer serving the warrant, and returned with the warrant two or three days later, and was then indorsed by the justice as having been filed on the day it was made. The docket entries of the justice referred to the affidavit as a pleading so filed pursuant to statute. *Held,* that the affidavit was filed with the justice when it was first made, and he did not lose jurisdiction by his failure to retain it in his office and to indorse it at that time. *State ex rel. Kaltenbach v. Shiel.* 254

Appeal: Hearing: Evidence how construed.

2. The provision in sec. 3769, Stats. 1898, that upon the hearing of an appeal from a justice, where there is no new trial, "the appellate court shall give judgment according to the weight of the evidence and the justice of the case . . . without regard to the finding of the justice," does not mean that the evidence must be construed most strongly in favor of the losing party. *Smith v. Norton,* 458

LABOR ORGANIZATIONS: Forbidding discharge of employee because a member. See CONSTITUTIONAL LAW, 9.

LACHES. See INJUNCTION, 3. LIENS. PLEADING, 6. VENDOR AND PURCHASER, 4.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. In an action to recover of a tenant for negligence, alleged to consist in leaving an awning hanging down in a storm, whereby it was blown against and broke a plate-glass window, the question of negligence is for the jury, and it is not error to exclude the opinion of a witness that it was dangerous to do so. *Miles v. Stanke,* 94
2. In such case it is not prejudicial error to submit to the jury the question of whether the window was broken through the negligence of the tenant, nor to instruct that the burden of proof on the question of negligence was on the tenant, and, if they found that the tenant was negligent and such negligence was the proximate cause of the breaking of the window, the plaintiff should recover, otherwise the tenant. *Ibid.*

LEADING QUESTIONS. See WITNESSES, 6, 7.

LIBERTY. See CONSTITUTIONAL LAW, 9.

LICENSE.
To cut and ship ice. See CONSTITUTIONAL LAW, 6.
To be upon dangerous premises. See NEGLIGENCE, 1.
To practice medicine. See PHYSICIANS, 1, 2.
To hunt. See TRESPASS.

LIENS.

On land: Sale: Judgment for deficiency. See JUDGMENT, 4.

For building materials: Vacating sale: Laches.

In an action to set aside a sheriff's deed it appeared that plaintiff had contracted for the purchase of the land and had made payments; that a lien for building materials furnished to him was foreclosed, after a contest, and the judgment directed a sale of his interest in the land; that his attorney, not being informed that plaintiff had any interest in the property, in good faith advised him that the lien was invalid, but the lienor did not know of such advice; that nearly two years later plaintiff had a conversation with the lienor relative to a settlement, but no agreement to delay enforcement of the judgment was made; that soon after the land was advertised and sold pursuant to the judgment; that notice of motion to confirm the sale was given to plaintiff's attorney, but he, still supposing plaintiff had no interest, did not notify the latter; and that the sale was duly

confirmed. *Held*, that plaintiff had been guilty of laches and was not entitled to relief. *Radtke v. M. Winter L. Co.* 444

Of judgment: Docketing. See BASTARDY.

For advances on goods, before delivery. See SALES, 2.

LIFE INSURANCE. See INSURANCE.

LIMITATION OF ACTIONS. See ASSIGNMENT FOR BENEFIT OF CREDITORS. COUNTIES, 3. PLEADING, 6, 7. TAX TITLES, 2. VENDOR AND PURCHASER, 4. WATERS, 1.

LIMITED PARTNERSHIP. See PARTNERSHIP.

LOAN AND BUILDING ASSOCIATIONS. See BUILDING AND LOAN ASSOCIATIONS.

LOGS AND LUMBER. See CONTRACTS, 6–9. SALES, 1–3.

MALFEASANCE in office. See APPEAL, 4, 5.

MALICIOUS PROSECUTION.

See TRIAL, 16, 20.

1. In an action for malicious prosecution, it is error to refuse to instruct the jury that the burden of proof to show want of probable cause was upon the plaintiff. *Cullen v. Hanisch*, 24
2. In actions for malicious prosecution, probable cause or want of probable cause necessarily depends upon what the prosecuting party knew or ought to have known at the time of instituting the criminal prosecution, and hence, in the absence of a certificate of the magistrate, under secs. 4760, 4791, Stats. 1898, that the complaint in the criminal action was wilful and malicious and without probable cause, the acquittal is not *prima facie* evidence of the want of probable cause. *Bigelow v. Sickles*, 80 Wis. 98, distinguished. *Ibid.*
3. In such action it is not error to refuse to instruct the jury that "the fact that plaintiff was discharged upon his trial in the criminal case is not conclusive evidence of want of probable cause." The instruction should have been, "The acquittal of plaintiff in such criminal action is no evidence of want of probable cause." *Ibid.*

MALPRACTICE. See PHYSICIANS, 3–12.

MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER AND SERVANT.

Contract: Presumption that services were gratuitous.

1. As between brothers, between forty and fifty years of age, each married, each for years managing his own individual affairs, and neither being dependent upon the other, there is no presumption that services, rendered after the arrival of claimant's family, in superintending the erection of houses were gratuitous, although before the arrival of his family, and for the first six weeks of such services, claimant had been living with his brother as a guest. *Williams v. Williams*, 79
2. The presumption that such services were not gratuitous not arising, a contract to pay their reasonable value is implied from the mere fact of the rendition of valuable services by one brother to another, with the knowledge of such other. *Ibid.*

3. Plaintiff, who lived in her own home and supported herself by washing and house-cleaning for others, had, on several days in each week for a number of years, performed such work for defendant, her son-in-law, at his home and at her own residence, with his approval, but without any express agreement either that such services should be paid for or that they should be gratuitous. Defendant had rendered her some occasional favors in the transaction of her business. *Held*, that a contract to pay for plaintiff's services would be implied, the facts being insufficient to raise a presumption that they were gratuitous. *Winter v. Greiling*, 378

Contract: Authority of agent of corporation. See CORPORATIONS, 8–10.

Statute forbidding discharge of employee because member of union. See CONSTITUTIONAL LAW, 9.

Injuries to servants through negligence.

4. In an action for injuries sustained by a brakeman while coupling cars, it is *held*, upon the evidence, that plaintiff must be presumed to have known of a custom to continue backing the engine until a signal to stop was given, and to have assumed the risk incident thereto; and that the fireman in charge of the engine was not negligent. *Zahn v. M. & S. R. Co.* 38

5. In an action for personal injuries sustained by a common laborer upon defendant's coal docks, alleged to have been caused by negligence of the foreman in placing the tripping device upon a wire cable, whereby the coal in a bucket running upon said cable was dumped outside of the hopper into which it should have emptied, and upon the plaintiff, who was passing beneath, there was no claim that there was any defect in the apparatus itself or in the system by which it was generally operated; and it appeared that the shifting and placing of the tripper was merely a detail in the operation of the apparatus, done frequently in the unloading of a vessel, and commonly by members of the working force to which plaintiff belonged. *Held*, that in so placing the tripper the foreman was merely a fellow-servant of the other employees, including plaintiff, and that for any negligence therein the defendant is not liable. *Okonski v. P. & O. Fuel Co.* 448

6. In such a case the facts that the foreman had authority to hire, discharge, and direct the dock force, and was charged with the duty to see that the docks were so operated as to be safe, and to provide necessary lights, signals and warnings, did not render him other than a fellow-servant of plaintiff while performing the specific act mentioned. *Ibid.*

7. It appeared that it was customary, when unloading a vessel at night, to place gasoline torches at the hoppers into which the coal was to be dumped, and that this was the duty of certain of the dock force known as "water boys." Defendant had provided such torches. *Held*, that the omission to use them at the moment of plaintiff's injury, if negligence, was negligence of his fellow-servants. *Ibid.*

8. In an action for injuries sustained by an employee in a coal yard through the fall of a timber which had formed a part of a structure supporting tramways, the evidence is *held* sufficient to sustain findings of a special verdict to the effect that the support or fastenings of the beam which fell had been so far destroyed by the fire as to render the place where plaintiff

was working unsafe and dangerous; that defendant was chargeable with knowledge of that fact; that the plaintiff was not chargeable with such knowledge; and that defendant should reasonably have foreseen that such an accident was likely to result from the defect. *Nix v. C. Reiss Coal Co.* 493

9. It appearing that the post in question was so braced that its top leaned toward the east, the fact that, although the mass of coal struck the post on its westerly side, the horizontal beam which had been resting on the partially burned-away top fell to the eastward, and the post was afterwards found leaning slightly to the west, does not render unreasonable or purely conjectural the conclusion that the defective condition at the top of the post was the proximate cause of plaintiff's injury by the falling timber. *Ibid.*

10. An instruction that, in order to find proximate causation, the jury must be satisfied that the injury was the natural and probable consequence of the defect, and foreseeable by the exercise of ordinary care, was correct, and, while some of the terms used might properly have been amplified, the omission of such amplification was not error, in the absence of a formal request therefor. *Ibid.*

11. A refusal to submit for special verdict the question whether the risks and dangers of plaintiff's work were open and obvious to a person of ordinary intelligence, is *held* not to have been error, where the jury were required to find whether or not the plaintiff knew of the unsafe and dangerous condition or by the exercise of ordinary care should have known of it. *Ibid.*

12. The fact that plaintiff and his fellow laborers, as they carried off the coal, progressed from one end of the shed towards the other did not constitute such a change in, or creation of, the conditions of the place to work, as to relieve the defendant from liability for damages caused by the dangerous condition of the post at the point where it supported the timber. *Ibid.*

13. The admission of evidence of the taking down of a portion of the superstructure lying in the direction from which the removal of the coal had progressed is *held* not to have been prejudicial to defendant, where the court excluded, because not pleaded, any liability of the defendant for any weakening of the remainder of the structure arising from such removal. *Ibid.*

MAXIMS.
Expressio unius est exclusio alterius, 251, 578, 581.
Sic utere tuo ut alienum non lædas, 540, 546.

MECHANICS' LIENS. See LIENS.

MENTAL CAPACITY. See CRIMINAL LAW, 6.

MERGER. See MORTGAGES.

MILLS AND MILL-DAMS. See CONSTITUTIONAL LAW, 4. PUBLIC LANDS.

MONEY RECEIVED.

See COUNTIES, 3–7.

1. An action for money had and received can be maintained only when the defendant has received money which in equity and good conscience he ought to pay to the plaintiff. *Glendale Inv. Asso. v. Harvey Land Co.* 408

2. The secretary and treasurer of several corporations, including the plaintiff, the defendant, and the H. B. & L. association, having a check for $3,879.72 belonging to plaintiff, indorsed it in plaintiff's name and deposited it in a bank to the credit of defendant. Shortly afterwards he gave to the H. B. & L. association, on account of his individual indebtedness thereto, checks to the amount of $3,825, signed in defendant's name by himself as secretary, and such checks were paid. At the times mentioned defendant had on deposit, of other funds, only $22.39. No entry of the deposit or of the checks was made on defendant's books, and the transaction appeared only in its bank account. Defendant had no account with plaintiff, was not indebted to the secretary or to the H. B. & L. association, and did not learn of the deposit and checks until nearly a year after the transaction. *Held*, that plaintiff could recover from defendant, in an action for money had and received, only the $54.72 which remained of said deposit after payment of the checks mentioned. *Ibid.*

MORTGAGES.

See USURY.

The complaint in an action to foreclose a mortgage, in addition to the usual averments, alleged that a prior mortgage had been given to one K. for the benefit of defendant F., who furnished the whole consideration, and that F. was the owner of said prior mortgage when, subsequently, the legal title to the land was conveyed to him in satisfaction of the mortgage debt. In addition to the usual relief, judgment was asked that the K. mortgage be declared extinguished and that plaintiff's mortgage be declared to be the first mortgage lien on the property. *Held*, that the allegations mentioned did not attempt to state a separate cause of action against F., involving either a question of paramount title or a question of merger by implication, but merely called for a determination, essential to complete relief, of a question of priority of liens, depending on whether or not the prior mortgage had in fact been paid as alleged. *Herman v. Felthousen*, 423

MOTIONS AND ORDERS. See APPEAL, 10, 11, 17, 18. JUDGMENT, 1, 2.

MUNICIPAL CORPORATIONS.

Capacity to sue: City attorney: Authority.

1. A provision in a city charter that "the city attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the common council," does not affect the question of the city's legal capacity to sue; and the objection that the city attorney had not been ordered by the council to commence an action is not ground for demurrer, but must be raised, if at all, by answer. *Milwaukee v. Herman Zoehrlaut L. Co.* 276

Right to recover for water taken clandestinely: Action for conversion. See WATERS, 7, 8.

Street improvements: Adoption of resolution: Arbitrary assessment.

2. Under a city charter providing that no resolution for improving a street without petition shall be voted upon at any meeting

of the council held within four weeks from the time of its presentation, such a resolution may be adopted on tne twenty-eighth day after its presentation. *Friedrich v. Milwaukee*, 304

3. Under the charter of Milwaukee (secs. 7, 8, subch. VII) the cutting down of a street was unlawful and subjected the city to liability for the consequent injury to abutting property, where the board of public works, in making the required assessment before ordering the work, did not take into consideration the injury which might result to the abutting lots, but, although the cut varied from almost nothing to nearly thirty feet in depth, made an arbitrary assessment of benefits, based solely on the cost of the work, at a uniform rate per foot, except as to two lots, and as to part of one of them made no assessment. *Ibid.*

Telephone companies: Extension of lines: Approval of plans: Duty of council. See TELEPHONE COMPANIES.

Street railways: Power of city to grant franchise. See STREET RAILWAYS, 2–4.

Waterworks: Construction of ordinance granting franchise. See WATERS, 9, 10.

Electric street lighting: Ordinance granting franchise and containing contract: Construction: Breach: Rescission, etc.

4. Where a municipal ordinance grants to an electric light company a franchise to use the streets upon certain conditions and also contains a contract with the company for street lighting, breaches of the conditions which are germane only to the franchise—such as those which relate to the burying of wires or the painting of poles—constitute no defense to an action to enforce payment for lights furnished under the contract. *Kaukauna E. L. Co. v. Kaukauna*, 327

5. A provision in such an ordinance that the company shall give and, whenever requested, renew a bond to indemnify and save harmless the city from all damages arising out of the exercise of the privileges granted, and for faithful compliance with all the provisions of the ordinance, is germane both to the franchise and to the contract; but where the city has demanded a new bond merely to indemnify it for "all loss or damage by reason of the privileges granted them under the franchise," failure to comply with such demand does not put the company in default with respect to the contract or constitute a defense to an action thereon for lights furnished. *Ibid.*

6. An agreement, contained in such ordinance, that the company will furnish to the city, for street lighting, electric lights of specified power at a certain price per light, is an agreement to furnish all such lights as the city may, in reason, deem necessary and demand. *Ibid.*

7. Such agreement is an essential consideration or condition upon which the city's promise to pay for street lighting is based, and the injury to the city from a breach thereof cannot be measured in damages. Performance by the company is, therefore, a condition precedent to its right to recover for lights actually furnished, unless the city has so acted as to justify an assumption of acceptance, consent, or waiver. *Ibid.*

8. Where, after demanding that additional lights be furnished under such agreement, the city waited a reasonable time (some three

months) until the company's purpose not to furnish them became clear, paid for lights actually furnished meanwhile, then notified the company that it would no longer accept or pay for lights furnished by it, and thereafter did not accept or voluntarily receive further service from the company, the latter was not entitled to recover for street lights which continued to burn without any power on the part of the city to prevent it. *Ibid.*

[9. Whether for such a breach of the lighting contract the city might, by declaration and notice of rescission, effectually terminate the contract, not determined.] *Ibid.*

10. Where by reason of nonperformance of the lighting contract the company is not entitled to recover for lights furnished, it cannot complain of a judgment allowing it to recover the sum sued for, without interest and without costs, upon condition that it comply with provisions of the ordinance relative to burying its wires and giving a new bond. *Ibid.*

11. But the city could not, in the action on the contract to recover for lights furnished, interpose a counterclaim for specific performance of provisions of the ordinance which are germane only to the franchise granted; and a judgment in such action, so far as it contains a mandatory decree requiring the company to comply with such provisions, is erroneous. [Whether the city could obtain such relief in an independent suit, not determined.] *Ibid.*

12. In such an action to recover for lights furnished, the city offered, if the court concluded that the contract had not been effectively terminated by declaration and notice of rescission, to continue it upon condition that all refusals to abide its terms be abandoned by the company, and also to pay such sum as it ought for lights which had been furnished. Plaintiff was not legally entitled to any recovery, but the judgment allowed it to recover the amount sued for, without interest and without costs, upon condition that within four months it comply with certain provisions of the ordinance in respect to burying its wires and giving bond of indemnity. The judgment also, erroneously, on defendant's counterclaim, granted a mandatory decree for such compliance. Defendant did not appeal. *Held*, that as to the money recovery the judgment should be sustained, and plaintiff be given four months after entry of a corrected judgment to perform the conditions imposed. *Ibid.*

MUNICIPAL JUDGE. See OFFICERS, 4.

MURDER. See HOMICIDE.

MUTUAL ASSAULTS. See ASSAULT AND BATTERY, 1.

NAVIGABLE WATERS. See WATERS, 1–6.

NEGLIGENCE.

Causing death: Bursting of vat in distillery.

1. Plaintiff's intestate was upon the premises of defendant, a distilling company, to purchase slops, which were to be drawn from a large circular vat into his wagon. He was standing upon the platform of the vat for the purpose of stirring the slops therein, when the vat burst and he was scalded to death by its contents. Defendant had an employee whose duty it was to stir the slops, but it was a custom, known to and acquiesced in by defendant, for customers to stir them for themselves if

they wished, and the deceased had repeatedly been allowed to do so. *Held*, that deceased, being where he was by defendant's permission and upon business for their mutual benefit, was not a mere licensee, and defendant was liable for his death if the dangerous condition of the vat was known to it or discoverable by the exercise of ordinary care. *Hupfer v. National Distilling Co.* 279

2. Photographs of hoops claimed to have been upon the bursted vat are held to have been improperly admitted, because the evidence (discussed in the opinions) did not sufficiently identify the objects photographed as the hoops in question. *Ibid.*

3. Such photographs, if they had been shown to represent correctly the hoops of the vat, would have tended to show that some of such hoops were, at the time of the accident, rusted to such an extent as to destroy or partially destroy their efficiency, and that such condition could readily have been discovered by the exercise of ordinary care; and would have supported a finding of the jury that defendant ought to have known of such defective condition of the hoops prior to the accident. [BARDEEN and MARSHALL, JJ., are of the opinion that, even if admissible, such photographs were not sufficient, as against the overwhelming evidence to the contrary, to sustain such a finding. MARSHALL, J., is further of the opinion that, even if the objects pictured had been properly identified, the photographs were not admissible as the *sole* evidence of the condition of the hoops, such fact being susceptible of better proof by the testimony of witnesses.] *Ibid.*

Injuries to employees. See MASTER AND SERVANT, 4–12.

In performance of operation: Malpractice. See PHYSICIANS, 9–12.

Killing of animals on track. See RAILROADS.

Breaking of window. See LANDLORD AND TENANT.

Negligence of surety as to executing bond. See BONDS.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL. See APPEAL, 17, 18, 27. COUNTIES, 7.

NOTICE.
Of defective execution of bond. See BONDS.
Of calls or assessments. See CORPORATIONS, 2.
Of tax sale. See TAX TITLES, 3–5.
Of rescission. See MUNICIPAL CORPORATIONS, 9.
Of election to rescind. See VENDOR AND PURCHASER, 3.
Of denial of rights. See VENDOR AND PURCHASER, 4.

OFFICERS.

Action to try title: Who may maintain: Elections to fill vacancies.

1. Where the attorney general has refused to bring an action of *quo warranto* to try title to an office, a private person cannot maintain the action on his own complaint, under sec. 3466, Stats. 1898, unless he is entitled to the office, since, under sec. 3463, the proceeding is a "civil action," and therefore, under sec. 2605, must be prosecuted in the name of the real party in interest. *State ex rel. Heim v. Williams*, 402

2. Where there was no law authorizing an election for a certain office at an annual spring election, the fact that at that election a number of electors cast ballots for the relator for such office

and he received a majority of the votes so cast, does not constitute an election of him to the office, even though there was a vacancy in the office and the legislature had failed in its constitutional duty to provide for an election to fill such vacancy. *Ibid.*

3. A private relator who has no right to maintain an action to try title to an office is not aggrieved by a judgment adjudging the respondent entitled thereto. *Ibid.*

Removal for malfeasance: Denial of petition: Who may appeal. See APPEAL, 4, 5.

Contracts with public corporation in relation to public service: Validity.

4. Where a municipal judge, empowered by a resolution of the county board to rent a suitable room for holding his court, rents his own property therefor, he is one of the officers, and the transaction is a public service within the meaning of sec. 4549, Stats. 1898 (prohibiting public officers from being pecuniarily interested in any contract with public corporations in relation to any public service), and such contract is absolutely void. *Quayle v. Bayfield Co.* 108

Contracts against public policy: Surrender of official discretion. See CONTRACTS, 1.

OPINION EVIDENCE. See LANDLORD AND TENANT, 1. PHYSICIANS, 1–8. TRIAL, 7.

ORDERS.
Entry, etc. See JUDGMENT, 1, 2.
Appealable, etc. See APPEAL, 1–9.
Recitals. See APPEAL, 13, 14.

ORDINANCES. See MUNICIPAL CORPORATIONS, 4–12. WATERS, 9, 10.

PARTIES.

Capacity to sue, etc. See APPEAL, 4. EXECUTORS. GARNISHMENT. MUNICIPAL CORPORATIONS, 1. OFFICERS, 1, 3.

Death: Substitution of personal representative.

A receiver appointed by a state court having died after appealing from an order directing him to turn over the property to a trustee in bankruptcy, it was proper to allow his personal representative to be substituted as appellant. *State by Att'y Gen. v. German Exch. Bank,* 436

PARTITION.

1. In the absence of an agreement between the purchasers of land, either before or after the purchase, that it should be conveyed to a corporation thereafter to be organized, one of such purchasers will not be estopped from claiming partition on the ground that he ought to convey his interest to the corporation. *Page v. McMillan,* 206

2. Where the only matter in dispute between the parties to an action for partition is as to the extent of their respective interests, depending on the construction of the will of their common ancestor, that matter may be settled in the partition suit, and the fact that it has not been determined at law is not ground of abatement. *Deery v. McClintock,* 31 Wis. 195, distinguished. *O'Hearn v. O'Hearn,* 428

PARTNERSHIP.

With foreign corporations: Validity of contracts. See CORPORATIONS, 6.

Limited partnership: Failure to comply with statutes: Liabilities.

1. Where, in violation of sec. 1716, Stats. 1898, the business of a limited partnership is transacted by directors elected by the special partners, the latter become liable to creditors as general partners. *Strang v. Thomas,* 599
2. Failure of a limited partnership to put up the sign required by sec. 1713, Stats. 1898, renders the special partners liable to creditors as general partners. *Ibid.*
3. Renewal or continuance of a limited partnership beyond the time originally fixed for its duration, without having such renewal certified, acknowledged, and recorded as required by sec. 1711, Stats. 1898, renders all the partners liable for all the debts of the original partnership. *Ibid.*
4. One who purchased from the general partners an interest, representing a certain number of shares, in a limited partnership which had failed to conform to the requirements of secs. 1713, 1716, Stats. 1898, and who, at the expiration of the original agreement, signed an agreement for a continuance of the business for a certain time, without complying with sec. 1711, was liable as a general partner for all the debts of the company, even though he did not know the actual facts and did not intend to become a general partner; and he cannot complain of a judgment holding him liable only for a proportionate share of such debts. *Ibid.*
5. In an action to wind up the affairs of an invalid limited partnership, a judgment apportioning the indebtedness among the solvent members according to their holdings, giving them the right to call upon the insolvent ones for contribution at any future time, is not erroneous as against one of such solvent members. *Ibid.*
6. Judgment was properly rendered in such case against such of the members as were within the reach of the process of the court, and against members who had purchased the interests of retiring members; and the omission therefrom of those who, before any of the debts existing at suspension were contracted, had sold their interests to solvent members against whom judgment was rendered, was not erroneous. *Ibid.*

PAYMENT. See BILLS AND NOTES, 1, 2. COMPROMISE. CORPORATIONS, 1.

PHOTOGRAPHS as evidence. See NEGLIGENCE, 2, 3.

PHYSICIANS AND SURGEONS.

Evidence: Qualification to testify as experts: License.

1. Failure of a duly licensed physician to record his license as required by sec. 4, ch. 87, Laws of 1899, does not exclude him from testifying as an expert. *Allen v. Voje,* 1
2. The testimony of a witness, qualifying as a medical expert, that he was "a physician and surgeon duly licensed to practice in this state," in the absence of any evidence controverting it, or any cross-examination, is *held* to mean that he had received a license from the state medical board. *Ibid.*

3. In an action for malpractice, physicians, residing in a near-by city, were permitted, against objection, to answer a question whether, in their opinion, certain treatment was proper, and "sanctioned" by physicians and surgeons possessing and exercising ordinary skill and intelligence in the vicinity of the place where the treatment was given. *Held*, that such inquiry was proper as calling for a conclusion whether the specified treatment was in accord with the methods adopted by such physicians generally, and was not open to an objection that it called upon third persons to testify as to the opinions of others. *Ibid.*

4. In such case it appeared that the witnesses lived thirty miles from the place where the treatment was given, and qualified themselves to speak on the subject by testifying that they were familiar with the practice of medicine and customs of the profession in the latter place. *Held*, that no error was committed in permitting such inquiries to be made. *Ibid.*

5. In such case it is not prejudicial error to permit a physician to answer a question: "What conditions were necessary to a *thoroughly and completely aseptic* surgical operation?" where the witness's description of the required conditions did not go as far as the precautions which the testimony showed were taken, and which, it was substantially conceded, were necessary. *Ibid.*

6. In such action it appeared that plaintiff had requested her husband to go to defendant, a physician, and make certain inquiries as to the significance of her symptoms, and necessary treatment therefor. In testifying to his conversation with the defendant, he was asked: "Did he (the defendant) state what the operation would be? What operation was it he meant, if you know?" *Held*, that such questions clearly called for a part of a transaction within the field of the agency of the witness. *Ibid.*

7. It is not an abuse of discretion for the trial court to refuse to allow a trained nurse, attempting to testify as a medical expert, to answer questions calling for an opinion on a strictly medical subject, especially where it is apparent to the court that the party calling for such opinion is supplied with numerous experts, thoroughly qualified, who were permitted to testify on the subject. *Ibid.*

[8. Whether the purpose of sec. 1436, Stats. 1898 (prohibiting physicians from testifying as experts unless their qualifications be established by diploma or license as therein defined), is to confine all expert testimony upon medical subjects to persons having the statutory qualifications, or whether it is merely a restriction upon practicing physicians and surgeons, intended to induce them to comply with the statutory requirements with reference to license, not determined.] *Ibid.*

Malpractice: Instructions to jury: Damages.

9. In an action for malpractice, where the injury consisted in localization of pus following an operation by curettement, and necessitating the subsequent removal of plaintiff's ovary, neither a finding as to proximate cause, nor instructions thereon, are necessary. The defendant's duty to reasonably anticipate injury from the negligent conduct of such an opera-

tion, and the probability of injury, are apparent, as a matter of law. *Allen v. Voje*, 1

10. In an action for malpractice, an excerpt from an instruction—that "a departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been"—is not erroneous, where the court has, by the rest of the charge, excluded the idea of liability for variations from customary practice merely in the way of increased precautions, recognized as such. *Ibid.*

11. In such action an instruction, that if defendant did not follow such established practice as is "recognized, adopted, and followed by all physicians and surgeons in good standing," etc., it would be negligence, cannot be construed to require defendant to have and exercise the skill of *all* physicians residing in his neighborhood, but declares that he is liable only in case he omits a practice which was recognized and adopted by all. *Ibid.*

12. In an action for malpractice, where the injury resulted in much suffering, and necessitated a difficult operation—the removal of one of plaintiff's ovaries—resulting in impairment of health and genital functions, a verdict for $3,000 is not excessive. *Ibid.*

PLACE OF TRIAL. See VENUE.

PLAT OF LANDS: Recording. See VENDOR AND PURCHASER, 2–4.

PLEADING.

Joinder of causes of action. See MORTGAGES.

1. The test of whether more than one cause of action is stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. *Herman v. Felthousen*, 423

Allegations construed: Demand and refusal.

2. An allegation in a pleading that "the defendant refuses, and has ever refused, to account for or pay over" the indebtedness sued for, implies a previous demand, and is equivalent to an allegation of a demand and a refusal. *Brossard v. Williams*, 89

Demurrer: Irregularities: Waiver. See APPEAL, 3.

Counterclaim. See MUNICIPAL CORPORATIONS, 11.

3. In an action for assault and battery defendant may counterclaim damages resulting from any assault committed on him by plaintiff in the course of the encounter, although he himself was the original aggressor. The word "transaction" as used in sec. 2656, Stats. 1898, is broad enough to include the entire, continuous physical encounter. *Gutzman v. Clancy*, 589

Denial of new matter in answer: Reply unnecessary.

4. Under sec. 2667, Stats. 1898, new matter set up in an answer—not pleaded as a counterclaim—is deemed denied and avoided without formal reply. An order striking a cause from the calendar of the trial court, based wholly on allegations of the answer that a prior action between plaintiffs and defendant's privies in title, involving the determination of the same controversy, was pending in the federal court, was erroneous, the

plaintiff in such case being entitled to rest on his statutory reply and insist that the issue raised be tried regularly as other issues of fact are tried. *Ashland v. W. C. R. Co.* 104

Bill of particulars not evidence. See EVIDENCE, 1.

Amendment of pleading: New facts: Statute of limitations.

5. Where a judgment is reversed because certain essential facts do not appear, and the cause is remanded with direction to allow such facts to be shown, it is not error, though perhaps unnecessary, to allow the complaint to be amended so as to allege such facts. *Emerson v. Schwindt,* 124
6. Refusal to permit an answer to be amended by setting up the statute of limitations is *held* not an abuse of discretion, it appearing that at the time of answering all the material relevant facts were known to defendant, or might have been known by the exercise of ordinary diligence, that were known when the application for leave to amend was made. *Rice v. Ashland Co.* 130
7. Refusal to permit an answer to be amended so as to set up the statute of limitations is not a material error where it appears that the action was commenced within the time limited. *Ibid.*

Pleading by particular persons or in particular cases. See CORPORATIONS, 2, 3. MUNICIPAL CORPORATIONS, 1. EXECUTORS, 1. REPLEVIN.

Pleading in criminal cases. See CRIMINAL LAW, 1–5.

POLICE POWER. See CONSTITUTIONAL LAW, 8, 9. WATERS, 3, 4.

POSSESSION.
Of land. See EJECTMENT. TENANTS IN COMMON.
Of chattels. See REPLEVIN. SALES, 1–3.

POSTING of notices. See TAX SALES, 4, 5.

PRACTICE. See ACTION. APPEAL. ASSIGNMENT. BANKRUPTCY. COSTS. CRIMINAL LAW AND PRACTICE. DEPOSITIONS. DISCONTINUANCE. DIVORCE. EQUITY. EVIDENCE. EXECUTION. GARNISHMENT. JUDGMENT. JUSTICES' COURTS. OFFICERS, 1, 3. PARTIES. PLEADING. SUPREME COURT. TRIAL. VENUE. WITNESSES.

PRESUMPTIONS. See MASTER AND SERVANT, 1–4. VENUE, 2. WILLS.

PRINCIPAL AND AGENT. See CORPORATIONS, 7–10. INSURANCE, 2. PHYSICIANS, 6.

PRINCIPAL AND SURETY. See BONDS. EXECUTION.

PRIORITY of liens. See MORTGAGES.

PRIVILEGED COMMUNICATIONS. See WITNESSES, 1–5.

PROBABLE CAUSE. See MALICIOUS PROSECUTION.

PROMISSORY NOTES. See BILLS AND NOTES, 1, 2.

PROXIMATE CAUSE. See MASTER AND SERVANT, 9, 10. PHYSICIANS, 9.

PUBLIC LANDS.

1. Artificial flooding of lands in the public domain of the United States does not affect the title thereto. *Diana Shooting Club v. Lamoreux,* 44
2. The federal swamp land act of 1850 vested in the state, as of the date the act took effect, the title to all lands determined by the general land department of the United States to be affected thereby. The decision of such land department on that ques-

tion is conclusive except against persons claiming under a paramount title. *Ibid.*

3. Lands of the United States, at the date of the swamp land act of 1850, approved by the proper officers of the general land department as being lands of the character intended to be granted thereby, were, by such act and approval, segregated from the public domain and vested in the state, regardless of whether they were, at the date of such act, artificially covered by navigable water, by trespasses upon such domain. *Ibid.*

PUBLIC POLICY. See CONTRACTS, 1.

QUITCLAIM DEED: Acceptance. See VENDOR AND PURCHASER, 1.

QUITCLAIM PURCHASER of mortgaged land. See USURY

QUO WARRANTO. See OFFICERS, 1-3.

RAILROADS.

Agreement to build road through village. See SPECIFIC PERFORMANCE.

Injuries to employees. See MASTER AND SERVANT, 4.

Killing of animals on track: Defective cattle guard.

1. In an action against a railway company for the killing of a horse, the evidence, though circumstantial, is *held* sufficient to support a finding of the jury that the horse went upon defendant's right of way over a defective cattle guard, and while there was struck by a passing train. *Herrell v. C., M. & St. P. R. Co.* 605

2. A pasture gate on a highway, a mile and a quarter from a railway crossing, was opened to drive cows to the closely adjoining barnyard, and was allowed to remain open about half an hour while the cows were being milked. When the gate was opened plaintiff's horses were in the pasture, seventy rods away. They were quiet, and with no known tendency to escape. Their barn was in the opposite direction from the railway, and it does not appear that there was anything likely to attract them toward the track. *Held* that, although plaintiff knew that one of the cattle guards at the crossing was defective, the question whether he was guilty of contributory negligence in leaving the gate open was one for the jury. *Ibid.*

3. The fact that animals are astray or trespassing upon the highway whence they go upon a railway right of way over a defective cattle guard, does not exempt the railway company from its liability for injury to such animals, imposed by sec. 1810, Stats. 1898. *Ibid.*

Street railways. See STREET RAILWAYS.

RAPE.

See CRIMINAL LAW, 8.

1. Upon a prosecution for rape of a child under the age of consent, where the circumstances were such that had she been over the age of consent the offense would have been fornication, evidence of other violations of her by the defendant was admissible as tending to corroborate the testimony as to the particular act charged. *Lanphere v. State,* 193

2. The uncorroborated testimony of the prosecutrix may be sufficient to sustain a conviction of rape, especially if she was under the age of consent. *Ibid.*

3. The fact that the prosecutrix gave birth to a child at a time consistent with the accusation is corroboration of her testimony. *Ibid.*

RATIFICATION. See INSURANCE, 2.

REAL PROPERTY. See BASTARDY, 1. BOUNDARIES. CONSTITUTIONAL LAW, 4. COUNTIES, 3–7. COUNTY SURVEYOR. DIVORCE, 1. EASEMENTS. EJECTMENT. EMINENT DOMAIN. JUDGMENT, 4. LANDLORD AND TENANT. LIENS. MORTGAGES. PARTITION. PUBLIC LANDS. STREET RAILWAYS, 1. TAX TITLES. TENANTS IN COMMON. TRESPASS. USURY. VENDOR AND PURCHASER. WATERS, 1.

RECEIPT. See INSURANCE, 4.

RECEIVERS. See APPEAL, 7. BANKRUPTCY. PARTIES.

RECITALS in orders. See APPEAL, 13, 14.

RECORD of deed: Seal. See EVIDENCE, 2.

RECORD on appeal. See APPEAL, 10–15.

RECORDING of plat. See VENDOR AND PURCHASER, 2–4.

RECORDING of resolution taking land. See EMINENT DOMAIN.

REFERENCE. See APPEAL, 6. DIVORCE, 2. INJUNCTION, 4.

REMOVAL from office. See APPEAL, 4, 5.

REPLEVIN.

See JUSTICES' COURTS, 1. SALES, 3.

A complaint in replevin stating that plaintiff is the owner of the property and entitled to its possession, and that defendant has wrongfully taken and unlawfully detains the same, is sufficient, although it does not allege that plaintiff is entitled to the "immediate possession." *Smith v. Wis. Inv. Co.* 151

REPLY. See PLEADING, 4.

RESCISSION of contract. See INSURANCE, 7. MUNICIPAL CORPORATIONS, 9. SALES, 4. VENDOR AND PURCHASER, 3, 4.

RESOLUTION for improving street: Adoption. See MUNICIPAL CORPORATIONS, 2.

RETURN on appeal. See APPEAL, 10, 11, 13.

REVERSAL. See APPEAL, *Affirmance and reversal.*

ROADS AND STREETS. See CONTRACTS, 1. MUNICIPAL CORPORATIONS, 2, 3.

RULES OF COURT.
Supreme Court Rule V (Return on appeal), 273, 275.

SALES.

Contract construed: When title passes: Lien: Possession.

1. Under the terms of a certain contract for the sale of lumber to be sawed thereafter, it is *held* that the title did not pass to the vendees until the lumber was delivered to and accepted by them. *Smith v. Wis. Inv. Co.* 151

2. Under said contract it is further *held* that the vendees were not entitled to a lien on the undelivered lumber for advancements of money to the vendor, and could not claim it as against a mortgagee of the vendor. *Ibid.*

3. An attempt by the vendees to take possession, by marking the piles of lumber in the absence of vendor and after he had mortgaged the same, gave the vendees no title and no right to maintain replevin against the mortgagee, whether his mortgage was or was not valid. *Ibid.*

Rescission for fraud.

4. In the absence of clear proof of known insolvency or of false representations made to induce a sale of goods, evidence of an intent to defraud creditors, formed some months after the sale, is not sufficient to justify an inference of a predetermined intent not to pay for the goods, such as would give the vendor the right to rescind the sale. *Leedom v. Mayer,* 267

Warranties: Breach: Evidence: Damages.

5. Where there is an express warranty of quality of goods sold, there is no implied warranty of fitness for the special use intended, although that purpose was known to the vendor. *Dwight Bros. P. Co. v. Western P. Co.* 414

6. Where paper was sold on a warranty that it had a quality and strength equal to the paper which the vendee was then using, evidence that the paper purchased would not pass through certain machines used by the vendee without breaking is immaterial on the question whether there had been a breach of warranty, in the absence of evidence that the paper in use at the time of the purchase would pass through said machines in good condition. *Ibid.*

7. In such a case evidence that the amount of the output of the vendee's machines decreased and the percentage of waste paper increased when it began to use the vendor's paper, is immaterial, in the absence of evidence that the paper in use before the change was made was paper of the kind referred to in the warranty. *Ibid.*

8. In an action for the purchase price ($2.65 per hundred) of paper, where defendant alleged breach of a warranty as to quality, it is *held*, upon the evidence, that defendant could not complain of a verdict fixing the value at $2.30 per hundred, as being based on mere conjecture, although no witness testified directly to that amount. *Ibid.*

SALES OF LAND. See COUNTIES, 3–7. EQUITY. JUDGMENT, 4. LIENS. TAX TITLES. TENANTS IN COMMON. VENDOR AND PURCHASER.

SEALS: Device on record of deed. See EVIDENCE, 2.

SECURITY FOR COSTS. See APPEAL, 1. COSTS.

SETTLEMENT. See COMPROMISE AND SETTLEMENT.

SPECIAL VERDICT. See APPEAL, 22. MASTER AND SERVANT, 11. TRIAL, 8, 10, 14–22.

SPECIFIC PERFORMANCE.

See MUNICIPAL CORPORATIONS, 11.

1. Courts of equity exercise their discretion in the matter of granting or refusing their aid to enforce specific performance of contracts; and may refuse such aid where a contract lacks certainty as to essential terms, even though the uncertainty exists by reason of defendant's fault, or when any of such terms depend on the will, discretion, or personal acts of individuals, so that a decree, if granted, might fail of complete efficacy. *Park v. M., St. P. & S. S. M. R. Co.* 347

2. A railway company agreed with certain residents of a village to build and operate a railway from its main line (some ten or fifteen miles distant) northerly through said village to the north line of the county, such railway to be built and located on such line and location as the company should thereafter determine. The starting point, under such agreement, might be at any point within a space of about twenty-five miles. The company afterwards refused to locate or build the railway. *Held*, that a decree of specific performance might properly be refused. *Ibid.*

3. Where a court of equity refuses to enforce specific performance of a contract it should not retain jurisdiction for the purpose of awarding damages for the breach thereof, if no reason is shown why such damages should not be recovered at law. *Ibid.*

STATUTE OF LIMITATIONS. See COUNTIES, 3. PLEADING, 6, 7. TAX TITLES, 2. VENDOR AND PURCHASER, 4. WATERS, 1.

STATUTES.

Title of private or local act. See CONSTITUTIONAL LAW, 1–4.

Amendment: Clerical error in recital.

1. A statute (sec. 3187*a*, Stats. 1898) was amended by striking out certain words. A subsequent amendment was expressly limited to another portion of the section, but by inadvertence the words before stricken out were incorporated in the recital of the section as amended. *Held*, that such recital did not re-enact those words, but the clerical error should be disregarded. *Svennes v. West Salem*, 650

Mandatory or directory? See TAX TITLES, 6.

Constitutionality. See CONSTITUTIONAL LAW.

Construction. See APPEAL, 3–7, 21. BUILDING AND LOAN ASSOCIATIONS, 3, 7. CONSTITUTIONAL LAW, 3, 4. CORPORATIONS, 1, 4. COSTS. COUNTY SURVEYOR. DEPOSITIONS. DIVORCE, 1. EMINENT DOMAIN. EVIDENCE, 2. EXECUTION, 1. EXECUTORS, 3. GARNISHMENT. JUSTICES' COURTS. MUNICIPAL CORPORATIONS, 1–5. OFFICERS, 1, 4. PHYSICIANS, 1, 8. PLEADING, 3, 4. RAILROADS, 3. STREET RAILWAYS, 4. TAX TITLES. TELEPHONE COMPANIES. TRIAL, 17. USURY. VENUE. WATERS, 9, 10. WITNESSES, 4, 11.

2. The legislative intent of a law being plain, that intent must be considered the sole purpose of the enactment, however unreasonable or absurd the law may appear when so viewed. *Rossmiller v. State*, 169

3. An exposition of the meaning of a law in the law itself cannot be departed from by the courts. *Ibid.*

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STOCK AND STOCKHOLDERS. See CORPORATIONS, 1–3.

STREET LIGHTING. See MUNICIPAL CORPORATIONS, 4–12.

STREET RAILWAYS.

1. The owner of a lot abutting on a street may enjoin the laying of a street railway track which is about to be laid without authority of law in front of his premises. *Allen v. Clausen*, 244
2. Although a court of equity will not, at the suit of a private individual, question the regularity of the proceedings by which a municipality has, under duly delegated authority, granted a franchise on behalf of the state, of which the grantee is in *de facto* exercise and enjoyment, yet where a franchise is relied upon to justify otherwise unlawful acts, such a court may investigate and determine whether the grantor of such alleged franchise had power to grant it. *Ibid.*
3. Municipal corporations have power only by delegation from the state to grant franchises to use streets for street railway purposes. *Ibid.*
4. Sec. 1862, Stats. 1898, authorizes any municipal corporation to grant the use of its streets for street railway purposes to any corporation organized for such purpose, "or to any person who has the right to construct, maintain, and operate street railways." *Held*, that the words quoted refer only to persons who, under prior statutes, have already received franchises for such purpose, and no such franchise can be granted by a city to other individuals. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS, 2, 3.

STRIKING CAUSE from calendar. See APPEAL, 2, 13, 14.

SUBSTITUTION of personal representative. See PARTIES.

SUPPLEMENTARY PROCEEDINGS. See EXECUTION.

SUPREME COURT.

See APPEAL AND ERROR.

In view of the legislative policy declared in sec. 3200, Stats. 1898, that suits against the state for money recovery shall be brought only in the supreme court, it is *held* that a question of general and public interest, warranting the exercise of the original jurisdiction of that court, is always involved in a suit whose ultimate practical purpose is the recovery of public moneys from the state treasury, although that result may be sought through

coercion of the individual action of state officers. *State ex rel. New Richmond v. Davidson,* 563

SURETYSHIP. See BONDS. EXECUTION.

SURVEYS: Evidence: Official certificate. See COUNTY SURVEYOR.

SWAMP LANDS. See PUBLIC LANDS.

TAXATION.

Taxing power to be exercised for public purposes. See CONSTITUTIONAL LAW, 7, 8.

Double collection of taxes: Recovery from county.

A village organized under an invalid statute borrowed money from the state trust funds. Afterwards it was by law made a village and charged with the obligation to repay the money. A tax covering an instalment of the debt was collected twice by the county,—once from the village and once from the town in which the village was situated; but only the amount of the tax was paid over to the state. *Held,* that the amount retained by the county belonged to the town, and might be recovered by it. *Milwaukee v. Milwaukee Co.* 374

Taxes on land to be collected from personalty. See TAX TITLES, 7, 8.

Sales for taxes. See TAX TITLES. TENANTS IN COMMON.

TAXPAYER'S ACTION. See INJUNCTION, 2, 3.

TAX TITLES.

See TENANTS IN COMMON.

1. Under sec. 1047, Stats. 1898, providing that any description which shall indicate the land with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance shall be sufficient in tax certificates, a strip sixty-eight feet deep out of the west twenty-five feet of block 110—being the west twenty-five feet of lots 11 and 12, and the north eighteen feet of the west twenty-five feet of lot 10—is *held* to be sufficiently described in a tax certificate as, "W. 25 ft. by 68 ft. deep of lots 9, 10, 11, 12, block 110," although it did not in fact extend into lot 9 at all. *Cate v. Werder.* 122
2. Under sec. 1189, Stats. 1898, and even in the absence of such a statute, no limitation in favor of a tax deed or a tax certificate, except in case of actual possession founded on a tax deed, is applicable where the land sold for taxes was exempt from taxation. *Chicago & N. W. R. Co. v. Arnold,* 434
3. Under sec. 1132, Stats. 1898 (providing that the affidavit of publication of the delinquent list and notice of sale shall be transmitted to the county treasurer immediately after the last publication, and if not so transmitted within six days the printer shall not be paid for the publication), a failure to file the affidavit until ten days after the last publication did not invalidate the sale. *Allen v. Allen,* 615
4. Affidavits showing the posting of a notice of tax sale "at" four public places in the county, sufficiently show a posting "in" such places, as required by sec. 1130, Stats. 1898. *Ibid.*
5. The posting of a notice of tax sale at "the inside door" of the county treasurer's office will be presumed to be a posting in a

"conspicuous place" in such office, within the meaning of sec. 1130, Stats. 1898. *Ibid.*

6. Sec. 1141, Stats. 1898, providing that the county treasurer shall, immediately after the tax sale, deposit in the office of the county clerk a statement containing a description of each parcel sold, specifying the name of the purchaser, the amount, and the name of the owner, etc., is directory, not mandatory, and a failure to comply therewith does not invalidate the tax deed. *Pier v. Oneida Co.* 93 Wis. 463, limited. BARDEEN, J., dissents. *Ibid.*
7. Taxes upon real estate must, if possible, be collected from the personal property of the owner or occupant. *Ibid.*
8. The verified return of a town treasurer, made under sec. 1114, Stats. 1898, stating that he was unable to find any personal property out of which to collect the tax upon real estate, is conclusive upon that question, so far as the validity of the tax sale is concerned. *Ibid.*

TELEPHONE COMPANIES.

A telephone company having a franchise and right, under sec. 1778, Stats. 1898, to construct and maintain its lines upon the streets of a city and to extend such lines from time to time, submitted for approval its plans for an extension, pursuant to a city ordinance requiring such plans to be approved by the council. *Held*, that it thereupon became the duty of the council to take affirmative action recognizing the company's right, and that such duty was not affected by the subsequent adoption by the city of secs. 940c–940i, Stats. 1898, regulating the selling of franchises. *State ex rel. Wis. Tel. Co. v. Sheboygan,* 505

TENANTS IN COMMON.

1. One of several tenants in common, all of whom derive their title as heirs of their father, cannot acquire an outstanding tax title and assert it against his cotenants, even though he was not in possession of the land or under obligation to pay the taxes for which it was sold. *Allen v. Allen,* 615
2. In such a case one of the tenants in common, not himself in possession of the land, purchased an outstanding tax title, and afterwards conveyed one half of the property to a cotenant in possession who should have paid the taxes for which the land was sold. It did not appear that the purchase was made collusively for the benefit of the latter. *Held* that, to entitle the other tenants to have the tax title held for the common benefit of all, they should be required to pay their proportionate shares of the amount paid therefor, not merely of the amount necessary to redeem from the tax. *Ibid.*

TENDER. See INSURANCE, 8.

TIME: Computation. See MUNICIPAL CORPORATIONS, 2.

TITLE.
Of statute. See CONSTITUTIONAL LAW, 1–4.
To chattels. See SALES, 1–3.
To land. See CONSTITUTIONAL LAW, 4. COUNTIES, 3–7. EASEMENTS. EJECTMENT. EMINENT DOMAIN. EVIDENCE, 2. LIENS. MORTGAGES. PARTITION. PUBLIC LANDS. TAX TITLES. TENANTS IN COMMON. VENDOR AND PURCHASER.

TORTS. See ASSAULT AND BATTERY, 1, 2. CONSPIRACY. DAMAGES. HUSBAND AND WIFE. LANDLORD AND TENANT. MALICIOUS PROSECUTION. MASTER AND SERVANT, 4–13. NEGLIGENCE. PHYSICIANS, 9–12. PLEADING, 3. RAILROADS. REPLEVIN. TRESPASS. WATERS, 7, 8.

TOWN TREASURER. See TAX TITLES, 7, 8.

TOWNS. See CONTRACTS, 1. TAXATION.

TRESPASS.

See RAILROADS, 3.

1. A wrongful invasion of the right to use land for fishing and hunting is actionable regardless of the amount of the damages caused by such invasion. *Diana Shooting Club v. Lamoreux*, 44
2. Every wrongful intrusion by one person upon the legal rights of another is both an injury and a damage and is a proper subject for legal redress. *Ibid.*
3. A state license to hunt does not confer any right upon the holder thereof to go upon lands owned by private parties without their permission. *Ibid.*

TRIAL.

Discontinuance after submission. See DISCONTINUANCE.

Reception of evidence. See EVIDENCE. WITNESSES.

Arguments and conduct of counsel.

1. Defendant in an action for criminal conversation having called for the production of all letters purporting or claimed to have been written by him to plaintiff's wife, and having denied that he wrote the letters produced, afterwards testified that he supposed there were some such letters. From this admission plaintiff's counsel argued to the jury that defendant knew all the time that he had written the letters. *Held*, that this was in the line of legitimate argument. *Lee v. Hammond*, 550
2. Statements of counsel in the argument to the jury in an exciting trial, resulting apparently from an honest misunderstanding of the opening statement by the opposing counsel and of the evidence, are *held* not to constitute in this case a material error. *Ibid.*
3. In an action for criminal conversation it appeared that plaintiff had obtained a divorce from his wife and that she had afterwards died, and there was some claim that she had committed suicide. In the argument to the jury defendant had stated that plaintiff had sent her to her grave; that he wanted to get rid of her, that he might feed on new pastures; and that plaintiff was a blackmailer, a cuckold, a procurer, and was making merchandise of his wife's dishonor. Plaintiff's counsel in closing said defendant was a seducer and murderer. The court sustained an objection, saying there was no evidence upon which the statement that defendant was a murderer could be based. *Held*, that there was no error prejudicial to defendant. DODGE, J., dissents, being of the opinion that the conduct of plaintiff's counsel in impressing upon the jury by questions the fact that plaintiff's wife had committed suicide, and then asserting that

defendant was a murderer, was improper and prejudicial, in view of the large verdict, including punitory damages. *Ibid.*

4. Failure to object at the time to remarks of counsel in the argument to the jury, so as to give counsel an opportunity to correct or the court to rule, will be deemed a waiver of objection. *Gutzman v. Clancy,* 589

5. Remarks of plaintiff's counsel in his closing argument, to the effect that he knew defendant to be a man to whom money was of more importance than honor, were improper as an attempt to state facts as of counsel's own knowledge and not by way of inference from the evidence, and, in the absence of a proper ruling in response to defendant's objection, constituted prejudicial error. *Ibid.*

Taking case or question from jury. See APPEAL, 17, 18. ASSAULT AND BATTERY, 3. CONSPIRACY, 2, 3. CRIMINAL LAW, 5. LANDLORD AND TENANT. RAILROADS, 2. TRIAL, 23.

6. If there is credible evidence, however it may be contradicted, a question of fact arises to be passed upon by the jury. *Allen v. Voje,* 1

7. Opinion evidence as to an ultimate fact, based on a correct theory of the underlying facts, met by like evidence upon a wrong theory of such minor facts, does not create a conflict for solution by a jury. *Batavian Bank v. North,* 637

Instructions to jury. See APPEAL, 20-22. ASSAULT AND BATTERY, 4. CONTRACTS, 6, 7. CORPORATIONS, 8. CRIMINAL LAW, 6–9. LANDLORD AND TENANT, 2. MALICIOUS PROSECUTION, 1, 3. MASTER AND SERVANT, 10. PHYSICIANS, 9–11.

8. In submitting a special verdict it is error to inform the jury what would entitle plaintiff to recover, and, by grouping several questions together under general instructions, fail to charge the jury with instructions appropriate to each question. *Cullen v. Hanisch,* 24

9. The mere failure to give an instruction for which there was no request is not error. *Miles v. Stanke,* 94

10. It is error in submitting a special verdict to inform the jury how questions must be answered in order to enable plaintiff to recover. *Patnode v. Westenhaver,* 460

11. *Per* MARSHALL, J., speaking independently. An instruction that if the jury are satisfied that any witness intentionally testified falsely as to any material fact, then, although not bound to disbelieve all his testimony, they are at liberty to do so, excepting in so far as such testimony is corroborated by other credible evidence or by facts and circumstances, is criticised as leaving room for the idea that the testimony of such witness could not be rejected if corroborated. The approved method of stating the rule is: 'If you believe that any witness has testified wilfully false as to any material matter in the case, you may properly, but are not bound to, on that ground alone, reject all of his evidence not corroborated by some other credible evidence.' *Ibid.*

12. The court having charged the jury that if they found defendant had not been guilty of the wrong complained of that would end their consideration of the case and they should return a verdict in his favor, and that they should not find for the plaintiff unless they were convinced from all the evidence of the defend-

ant's guilt to a reasonable certainty, a further charge on the subject of damages, preceded by language to the effect that if they found from the evidence that defendant had committed the wrong then they should consider and determine the amount of damages, etc.— is *held* not to have been erroneous as assuming that defendant was guilty. *Lee v. Hammond*, 550

13. It is not error to refuse to give an instruction which is given in the general charge. *Ibid.*

14. The characterizing of instructions as being given at the request of one party or the other, or the failure to so characterize them, is not ordinarily reversible error. In the case of a special verdict the better practice is to make no distinction between that which originates with the court and that which originates with either counsel. *Gutzman v. Clancy*, 589

15. A charge which informs the jury of the effect upon the rights of the parties of the answers to questions in a special verdict, is erroneous. *Ibid.*

Verdict. See MASTER AND SERVANT, 11.

16. In an action for malicious prosecution the important issue on the trial was, whether the defendant procured the arrest of the plaintiff maliciously and without reasonable or probable cause to believe him guilty of the offense with which he was charged. Upon one of the questions submitted as part of a special verdict, the court instructed the jury: "If you find from the evidence that there was a general rumor . . . known to the defendant before the commission of said alleged offense . . . then you may take into consideration such fact, with the other evidence in the case, on the question of probable cause, and on the question of the defendant's acting in good faith and without malice." Defendant assigned as error the refusal to submit, as part of the special verdict, the question: "Was there a rumor in W., at the time the plaintiff was arrested on the charge of removing and concealing chattel-mortgaged property, that he was guilty thereof?" *Held*, not error, the question of general rumor having been by said instruction submitted to, and necessarily considered by the jury in its answer to the question of the special verdict submitted. *Cullen v. Hanisch*, 24

17. Under sec. 2858, Stats. 1898, the form of a special verdict is in the discretion of the court, subject to the qualification that it must be limited to such questions of fact as are controverted and put in issue by the pleadings, or, at most, to such as might properly have been put in issue thereby. *Ibid.*

18. A special verdict is not designed to elicit from the jury a mere abstract of the evidence, and questions relating merely to evidentiary facts are erroneous. *Ibid.*

19. In framing a special verdict it is error to split up important questions put in issue by the pleadings into a number of minor questions, the determination of some of which settle nothing so put in issue. *Ibid.*

20. In an action for malicious prosecution, it is error to submit, by separate questions, whether the defendant instituted the prosecution maliciously, and also whether he procured the warrant to be issued maliciously. *Ibid.*

21. The submission, in a special verdict, of numerous questions relating to merely evidentiary facts, and the giving of instruc-

tions, in connection therewith, containing unnecessary statement of general rules of law, are criticised. *Okonski v. P. & O. Fuel Co.* 448

22. In a case where five questions would have covered all the issues of fact, the submission for a special verdict of twenty questions—some referring to matters not in dispute, some to mere evidentiary matters, some mere repetition in whole or in part of others, some containing elements in the alternative so as to confuse the jury and render an affirmative or negative answer inconclusive as to any material point, and some suggesting to the jury prejudicial circumstances of which there was no evidence,—is *held* to have been a material error. *Patnode v. Westenhaver,* 460

23. A verdict directed for plaintiff by consent of both parties, subject to decision of the court on all issues of law and of fact after argument to be had, leaves the case to be determined on its merits unaffected by the verdict. *Fraser v. Ætna L. Ins. Co.* 510

New trial. See APPEAL, 17, 18, 27. COUNTIES, 7.

TRUSTS AND TRUSTEES. See JUDGMENT, 4. WITNESSES, 1.

UNDERTAKINGS. See EXECUTION.

UNION LABOR: Forbidding discharge of employee because member of union. See CONSTITUTIONAL LAW, 9.

USURY.

See BUILDING AND LOAN ASSOCIATIONS, 5–7.

[Whether, under a usury statute which only prevents recovery of interest when the proper defense is made, and requires the person setting up such defense to prove a tender of the principal sum, a mere quitclaim purchaser of premises mortgaged to secure the usurious contract may urge the defense of usury when the mortgagor has waived that right by not urging it, not determined. *Ludington v. Harris,* 21 Wis. 239, distinguished. *Boleman v. Citizens' L. & B. Asso.* 217

UTTERING forged check. See FORGERY, 2.

VENDOR AND PURCHASER OF LAND.

See COUNTIES, 3–7. USURY.

1. P.'s grantor, having agreed to sell land to C., afterwards insisted that, under the contract therefor, he was only required to give a quitclaim deed, while C. insisted he was entitled to a warranty deed, or an abstract showing clear title. Such controversy being submitted to arbitration, the arbitrator ordered the grantor, on payment of the balance due, to execute a deed covenanting against his own acts. He, however, executed a mere quitclaim deed, leaving it with the arbitrator for delivery when the purchase price was paid, and left the state. He had previously sold part of the land contracted to be conveyed, and part was encumbered by tax liens. C., having meanwhile contracted to convey the whole tract at an advance, being embarrassed by the delay, and with full knowledge of the defects and variances in the deed, took the deed from the depositary, and paid him the consideration awarded by the arbitrator; protesting that he did not accept the deed as a compliance with the

contract. *Held*, that C., by taking the deed, accepted full satisfaction of the contract, and had no right of action, except upon the deed itself, and, such deed being without warranty, he had no right of action thereon. *Porter v. Cook*, 60

2. A contract for the sale of certain lots "in B.'s division of Ashland" acknowledged payment of the whole purchase price except $1, which was to be paid "when the deed is executed and delivered." The vendor covenanted to convey the premises on demand after the payment of the $1. The contract recited that the plat of the land had not been recorded, and stated that "it is the purpose of this contract that it be a bond for a deed to be executed . . . whenever said plat is recorded." The purchaser was in possession under a prior contract, and had made improvements. *Held*, that there was reserved to the vendor only a reasonable time within which he should not be compelled to record the plat and convey the lots according to it, and that after nine years plaintiff's right to such conveyance was absolute. *Isaacs v. Bardon*, 142

3. Where, in such case, after lapse of nine years the vendor refused upon demand to record the plat or to execute a deed, and at the trial declared that he would not convey otherwise than by metes and bounds, the purchaser was entitled to an absolute rescission of the contract, and to recover back that which he had paid, together with the value of his improvements, with interest from the date of notice of his election to rescind. *Ibid.*

4. In such a case plaintiff was under no duty to act until he was notified of some denial of his rights by defendant, and his failure to do so for nine years, during which time he was in quiet possession and the vendor's position was in no wise changed, was not laches. *Ibid.*

5. Defendant, who was in possession of land under a parol agreement for its purchase from a corporation, made a written contract therefor with the receiver of the corporation, giving notes for the purchase price. By order of court the receiver sold the contract and notes and gave a quitclaim deed of the land to one who afterwards assigned the contract and notes and conveyed the land to plaintiffs. After the discharge of the receiver, the corporation quitclaimed to defendant. *Held*, that upon a conveyance by plaintiffs to defendant the legal title would vest in the latter; that he could not retain possession as against plaintiffs without paying for the land according to the contract; and that plaintiffs were therefore entitled to foreclose the contract. *Emerson v. Schwindt*, 124

VENUE.

1. Where the place of trial of the action was changed, and the records of the circuit court disclosed that in open court the affidavit and motion for such change were presented and "the change of venue ordered to the county court," it was *held* that there had been a complete compliance with sec. 2625, Stats. 1898, commanding that upon the affidavit and motion "the court shall change the place of trial," and "an order for a change of the place of trial shall be entered." *Allen v. Voje*, 1

2. Under sec. 2628, Stats. 1898, providing that "after the place of trial . . . shall have been changed and a trial had in the county to which the change was made, the proceedings or order

for such change shall be conclusive, except as against such objection as shall have been filed in writing upon a motion to remand before such trial was entered upon," an objection to the change cannot be made for the first time in the supreme court on appeal. The statute is intended to cure all defects, and to impose a conclusive presumption of waiver of all objection, and of consent to the change, unless objection be made in writing before entering upon the trial. *Ibid.*

VERDICT. See APPEAL, 17, 18. TRIAL, 16–23.

VILLAGES. See TAXATION.

VOLUNTARY ASSIGNMENT. See ASSIGNMENT FOR BENEFIT OF CREDITORS. WITNESSES, 1.

WAIVER.
Of objections. See APPEAL, 16, 19, 21, 23–25. TRIAL, 4. VENUE, 2.
Of right to benefit of bankruptcy laws. See COMPROMISE.
Of irregularities. See CRIMINAL LAW, 4.
Of forfeitures. See INSURANCE, 6.
Of defense of usury. See USURY.
Of privilege. See WITNESSES, 1–3.

WARRANTY. See SALES, 5–8.

WATERS.

Flooding of lands: When artificial condition becomes natural. See PUBLIC LANDS.

1. The rule that an artificial condition of water may, by lapse of time, become a natural condition as regards public rights, does not apply in the absence of any element necessary to change the title to the land by the operation of the statute of limitations. *Diana Shooting Club v. Lamoreux,* 44

Navigable waters: Rights of the people: Taking ice, etc. See CONSTITUTIONAL LAW, 5, 6.

2. The title to the beds of navigable lakes within the state of Wisconsin is vested in the state in trust to preserve the same for the enjoyment of the people. The state has no proprietary right in such beds or in the water above the same, nor in the fish that inhabit such water or the fowls that resort thereto, or the ice that forms thereon, which it can deal in by sale or otherwise. *Rossmiller v. State,* 169
3. The power of the state over navigable waters within its boundaries is limited to the enactment and enforcement of such reasonable police regulations as may be deemed necessary to preserve the common right of all to enjoy the same for navigation by boats or otherwise, and all incidents of navigable waters, including the taking of ice therefrom for domestic use or sale. *Ibid.*
4. The rights of the people in the navigable waters of the state are the same as those incident to tidal waters at common law. They are beyond the power of the state to interfere with, except by reasonable police regulations, as before indicated. *Ibid.*
5. The state has no greater right to sell ice that forms upon navigable lakes than to sell the water thereof in a liquid state or the fish that inhabit the water. It can do neither, the whole beneficial use of public waters being in the people of the state as a class. *Ibid.*

6. When the term "people of the state" is used to designate the beneficiaries of the trust in navigable waters, all the people who may choose to enjoy the same within the state are referred to, whether citizens of the state or persons who come within its territory for the purpose of enjoying such public rights. *Ibid.*

Public water supply: Clandestine taking of water: Right of city to sue.

7. A municipal corporation authorized by law to maintain waterworks and furnish water to private consumers has the right to sue and recover for water taken and not paid for, the same as an individual or a private corporation. *Milwaukee v. Herman Zoehrlaut L. Co.* 276

8. Although a city has established water rates and is empowered to collect such rates as taxes are collected, it may nevertheless recover the value of water clandestinely taken from the mains, in an action for conversion. *Ibid.*

Same: Ordinance granting franchise: Construction: Minimum rate.

9. A municipal ordinance granting a franchise to a waterworks company is not, in case of ambiguity, to be construed most strongly against the company, but by the same rules that govern in the construction and interpretation of statutes. *State ex rel. Vits v. Manitowoc W. Co.* 487

10. Such an ordinance fixed maximum rates which might be charged to private consumers for certain purposes, and continued: "For other domestic purposes, proportionate to the above, but the lowest annual rate in any case shall be five dollars. Manufacturing and special uses, rates to be based on quantity of water used. All parties have the privilege of furnishing water meter and paying only for water actually used at rates varying from 20 cents to 30 cents per 1,000 gallons, viz: Consumption less than 1,000 gallons per day, 30 cents," etc. When the ordinance was enacted, meters for domestic consumers were comparatively unknown. *Held*, that the provision relating to meters applied only to takers of water for manufacturing and special uses, and that the minimum rate for domestic purposes was five dollars. *Ibid.*

WILLS.

The fact that a testator has made provision for one of his heirs in the will is not sufficient to justify the presumption that he intended that property otherwise undisposed of should go to other heirs in equal shares, or warrant the addition to the will of such words as "and the balance to my other two children," in the absence of anything in the will itself to indicate such intention. *O'Hearn v. O'Hearn,* 428

WITNESSES.

Privileged communications: Attorneys.

1. An attorney employed by a person acting in a representative capacity, such as an assignee for the benefit of creditors, stands for the assignee or other trustee and not for the beneficiaries, and sustains substantially the same relation to his client as he would if the representative character were absent. The successor of the assignee or other trustee, therefore, cannot waive

the privilege of his predecessor in regard to communications made by the latter to the attorney while he was in office. *Herman v. Schlesinger,* 382

2. Where an attorney serves a client in his professional capacity in the making and the reduction to writing of an agreement between the client and a third person, the client does not, by procuring the attorney to sign as a subscribing witness, waive his privilege of secrecy in respect to confidential communications made during the preparation of the instrument. *Ibid.*

3. Where an attorney's services in a transaction are rendered to several persons, confidential communications to him in regard thereto cannot properly be disclosed unless all join in consenting to such disclosure. *Ibid.*

4. The privileged communication between attorney and client recognized by sec. 4076, Stats. 1898, extends only to those communications made by the latter to the former which are of a confidential character and are made for the purpose of enabling the attorney to serve the client, and to the legal advice given in respect to such communication, and does not extend to communications between the attorney and a third person in the transaction of the client's business. *Ibid.*

5. A witness cannot be compelled to disclose communications made to his attorney which would be privileged were the attorney under examination as a witness, but such privilege does not extend so far as to warrant the court in excluding a question on cross-examination as to whether, in the preparation of a cause for trial, the party was interrogated as to his knowledge respecting the matters in controversy and the questions and answers thereto reduced to writing for the purpose of enabling the attorney to know what his client might be expected to testify to. *Ibid.*

Examination: Leading questions.

6. The exclusion, as leading, of questions limiting the subjects of conversations called for, and the further exclusion, as too general, of questions not so limited, is *held* error. *Goodwin v. State,* 318

7. After such confusing rulings, counsel was entitled, upon request, to have the court suggest what questions might be asked. *Ibid.*

Credibility: Medical examination: Cross-examination.

8. After a witness has completed her testimony and left the stand, the court has no power to require her to submit to a medical examination to determine whether she is afflicted with hysteria, as a basis for evidence bearing upon her credibility, accuracy of memory, etc. *Goodwin v. State,* 318

9. The fact of a woman's illegitimate pregnancy, or of her making a complaint for bastardy, is not admissible as bearing on her credibility as a witness. *Ibid.*

10. After questions as to such facts had been permitted on cross-examination, and the witness had answered them, a mere remark of counsel that the questions were withdrawn did not cure the error. *Ibid.*

Same: Wilfully false testimony: Instructions to jury. See CRIMINAL LAW, 7. TRIAL, 11.

Same: Impeachment: Cross-examination.

11. On cross-examination of a party he was asked if a part of the time he had lived in a certain locality he had not been in jail. It did not appear, and the witness was not asked, whether he had ever been convicted of any criminal offense. *Held*, that the exclusion of such question was not error. Sec. 4073, Stats. 1898, authorizes proof of conviction of a criminal offense for the purpose of affecting the witness's "credibility, either by the record or by his own cross-examination," and the mere fact of his having been in jail is without significance. *Cullen v. Hanisch*, 24

12. It is not error to exclude a question put to a party on cross-examination, as to whether some years before six witnesses had testified that his reputation for truth and veracity was bad. Such testimony is hearsay and not legitimate cross-examination, and not a proper way of impeaching the party as a witness in his own behalf. *Ibid.*

13. It is not error to refuse to allow an impeaching witness to testify that, in another cause in which the plaintiff was a witness, he found eighteen witnesses who would not believe him under oath. *Ibid.*

WORDS AND PHRASES.

At a public place. See TAX TITLES, 4.
Conspicuous place, in statute. See TAX TITLES, 5.
Creditor, in statute. See EXECUTORS, 3.
Division of property, in statute. See DIVORCE, 1.
Filed. See JUSTICES' COURTS, 1.
Four weeks, in statute. See MUNICIPAL CORPORATIONS, 2.
In a public place, in statute. See TAX TITLES, 4.
Officers, in statute. See OFFICERS, 4.
People of the state. See WATERS, 6.
Person who has right, etc., in statute. See STREET RAILWAYS, 4.
Post up, in statute. See page 623.
Public service, in statute. See OFFICERS, 4.
Question of general and public interest. See SUPREME COURT.
Recorded, in statute. See EMINENT DOMAIN.
Subject to strikes, in contract. See CONTRACTS, 11.
Transaction, in statute. See PLEADING, 3.
Wholly void, in statute. See CORPORATIONS, 4.

WORK AND LABOR. See MASTER AND SERVANT, 1–3.

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